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The Intractable Refugee Gap in the Nordics: Can Human Rights Make a Difference?

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the degree of PhD

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Abstract

It is often postulated that third, faraway non-adjacent countries, the Nordics for example, collaborate with UNHCR, to permanently resettle a few refugees on a quota basis, as a ground to provide a durable solution to one of the most intractable refugee situations. Although, the decision is discretionary and benevolent, it is nonetheless grounded in international customary law since, normatively, refugees are to be protected from acts of persecution, scenes of desolation and other glaring human rights abuses, even by States which are yet to sign or formally ratify the Refugee Convention and the Refugee Protocol.

The sought-after solution, however, often becomes a short-term palliative because, nearly half of the refugees partially, intermittently, or never participate in gainful employment. The act violates one of the most fundamental and internationally recognized right to work. Under similar circumstances, other social and economic rights are also violated because, human rights are universal, indivisible, and interdependent and interrelated. The violation results in the Refugee Gap, which calls for crafting remedies even when the causal linkages, the *prima facie* evidences, sound too remote from justiciability.

This thesis approached the Gap using a novel method, by means of a multidisciplinary approach. It looked at the discrete events that cause and perpetuate the Gap, and how the natural consequences are captured and synthesized, using principles and norms developed from international human rights, regional as well as domestic jurisprudence.

In the short-term, even when economic and social rights are fully respected at minimum level, the Gap is ineluctable because of refugees' endogenous vulnerabilities. In the long-term, however, the Gap is symptomatic of the States' partial failure to respect, protect, and fulfil, the *ipso facto* human rights obligations. Finally, the exogenous factors which refugees have no much control over, are so powerful, that crafting remedies becomes an intricate process. Therefore, the panacea to the Gap and the full realization of refugees' right to work, *inter alia*, cannot be achieved without full commitment from authorities.

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Missouri v Jenkins, 515 US 70 (1995).

Abbreviations

ASIL	American Journal of International Law.
CESCR	Committee on Economic, Social and Cultural Rights.
CERD	Committee on the Elimination of Racial Discrimination.
CoE	Council of Europe.
CRPD	Convention on the Rights of Persons with Disabilities.
CUP	Cambridge University Press.
ECHR	European Convention on Human Rights.
ECtHR	European Court of Human Rights.
ESC	European Social Charter.
ESCR	European Social Charter (Revised).
FAFO	Institute for Labour and Social Research.
HRQ	Human Rights Quarterly.
JEP	Journal of Economic Perspectives.
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination.
ICESCR	International Covenant on Economic, Social and Cultural Rights.
IJCS	International Journal of Comparative Sociology.
ILO	International Labour Organization.
IRIS	International Research Institute of Stavanger.
IZA	Institute of Labour Research/Economic.
JHR	Journal of Human Resources.
JRS	Journal of Refugee Studies.
MJIL	Michigan Journal of International Law.
NAV	Norwegian Labour and Welfare Administration.
NIFU	Nordic Institute for Studies in Innovation, Research and Education.
NJRS	Nordic Journal of Religion and Society.
NOU	Official Norwegian Reports (<i>'Norges Offentlige utredninger'</i>).
OECD	Organization for Economic Co-operation and Development.

OHCHR	Office of the High Commissioner for Human Rights.
OJ	Official Journal of the European Union.
OUP	Oxford University Press.
PDES	Policy Development and Evaluation Services
S	Section
Res	Resolution.
RESC	Revised European Social Charter.
SSB	Statistics Norway.
SCB	Statistics Sweden.
UDHR	Universal Declaration of Human Rights.
UDI	Norwegian Directorate of Immigration.
UNGA	United Nations General Assembly.
UDHR	United Nations High Commissioner for Refugees.
UDI	Norwegian Directorate Immigration.
UNHCR	United Nations High Commissioner for Refugees.
UPR	Universal Period Review.

Chapter 1. The Refugee Gap

1.1 Introduction

Many years after resettlement, and when compared with that of other immigrants, the performance of refugees¹ in almost all areas of life is rated as poor.² However, the area of greatest concern is access to employment. Refugees suffer disproportionately from long-term unemployment,³ underemployment and low wages.⁴ They also experience extra hardships which result from lack of upward labour mobility, both geographically and occupationally. Refugees are over-represented among employees in temporary and part-time jobs, the underemployed,⁵ those who have difficulty retaining jobs and those suffering from ‘last-in-first-out’ redundancy policies. ‘Last in, first out’⁶ is a selection method of laying off employees starting with the newly recruited (with the shortest length of service), and it is the main principle that dominates the downsizing processes in Norway.⁷ In Sweden, an employer is free to use fixed-term contracts, hire labour from employment agencies on temporary basis, and use last-in, first out (LIFO) as the default downsizing policy.⁸ The situation severely distorts refugees’ ability to successfully participate in gainful employment and reconstruct their once broken lives.⁹ Refugees’ labour

¹ For a quick history of the definition of refugee and how World War II spearheaded the topic, see C Dustmann et al., *On the Economics and Politics of Refugee Migration* (Discussion Paper Number 10234, Institute of Labor Economics, IZA, 2016).

² E Ott, *The Labour Market Integration of Resettled Refugees* (PDES2013/16 UNHCR Geneva 2013).

³ E Ott, PDES2013/16 para 20.

⁴ Ibid para 41.

⁵ Over-qualified for the jobs they do, work fewer hours than they wish, for instance.

⁶ B Bratsberg, O Raaum and K Røed, *Immigrant Labor Market Integration across Admission Classes* (Discussion Paper Number 10531 IZA 2017) 21.

⁷ B Bratsberg et al., *Nordic Economic Review: Labour Market Integration in the Nordic Countries* (Nordic Council of Ministers, TemaNord 2017:520) 38.

⁸ O Åslund, A Forslund and L Liljeberg, ‘Labour market entry of non-labour migrants – Swedish evidence’ in B Bratsberg et al., *Nordic Economic Review: Labour Market Integration in the Nordic Countries* (TemaNord 2017:520, Nordic Council of Ministers 2017) 115- 158, 149.

⁹ The new countries of resettlement can sometimes be compared to exile by refugees. See Edward W Said, ‘Reflections on Exile’ in E Said, *Reflections on Exile and Other Literary and Cultural Essays* (Granta 2000). Exile is compared to a discontinuous state of being, where exiles are cut off from their roots, land and past but they have an urgent need to reconstitute their broken lives.

market integration is retarded, yet it is the best benchmark for measuring variables including the extent to which human rights are being respected.

Without access to gainful employment, refugees suffer in many areas, including an inability to escape persistent poverty,¹⁰ which leads to a plethora of other problems such as overdependence on welfare benefits¹¹ and social exclusion. Social exclusion is broadly defined as exclusion from the labour market, extreme material deprivation or both.¹² Exclusion from the labour market increases the likelihood of poverty.¹³ The likelihood of living in poverty is lower, the stronger the long-term attachment to the labour market.¹⁴ Access to employment and the benefits accruing from it, determine refugees' overall integration experience.¹⁵

In earlier research,¹⁶ the phenomenon was named the Refugee Gap (hereinafter referred to as 'the Gap'). The Gap, the fulcrum of this thesis, is not only described and explained,¹⁷ but is analysed and further synthesized in accordance with international human rights principles and norms. Remedies are crafted in accordance with the human rights obligations that States assume when they agree to respect international instruments such as the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹⁸ the European Social Charter¹⁹, etc. As noted,

¹⁰ S Langeland, E Herud and S Ohrem, *'Fattigdom og Levekår i Norge: Status 2013'* (Rapport 2014:1, NAV 2014) (Poverty and Living Conditions in Norway: Status 2013, NAV Report 2014:1).

¹¹ *Norges Offentlige Utredninger (NOU) 2011:14 Bedre Integrering: Mål, Strategier, Tiltak'* (Barne-, Likestillings- og Inkluderingsdepartementet, Oslo 2011) (Official Norwegian Report (NOU) 2011:14 Better Integration: Goals, Strategies, Measures', Ministry of Children, Equality and Social Inclusion, Oslo 2011).

¹² RJA Muffels and P Tsakoglou, 'Introduction: Empirical Approaches to Analysing Social Exclusion in European Welfare States' in RJA Muffels, P Tsakoglou and DG Mayes (eds), *Social Exclusion in European Welfare States* (Edward Elgar 2002) 1, 1.

¹³ R Goodin et al., 'The Real Worlds of Welfare Capitalism' in RJA Muffels, P Tsakoglou and DG Mayes (eds), *Social Exclusion in European Welfare States* (Edward Elgar 2002) 74

¹⁴ Ibid.

¹⁵ E Ott, PDES2013/16 para 2.

¹⁶ KE Cortes, 'Are Refugees Different from Economic Immigrants? Some Empirical Evidence on the Heterogeneity of Immigrant Groups in the United States' (2004) 86 (2) *The Review of Economics and Statistics* 465; P Connor, 'Explaining the Refugee Gap: Economic Outcomes of Refugees versus Other Immigrants' (2010) 23 (3) *Journal of Refugee Studies* 377.

¹⁷ The thesis took Kaplan's (1964) view: to explain is to put facts or laws into relation with others so that the thesis is 'intelligible' in MB Miles and M Huberman, *Qualitative Data Analysis* (2nd edn SAGE Publications) 144.

¹⁸ UNGA, Res A/2200A (XXI) (adopted 16 December 1966, entered into force 3 January 1976) (ICESCR).

¹⁹ Council of Europe (CoE), European Social Charter (18 October 1961, entered into force 26 February 1965, European Treaty Series (ETS) Number 35) (ESC).

‘...the protection and promotion of human rights and fundamental freedoms is one of the basic purposes of governments...’²⁰ If these obligations are violated through, for example, neglect and non-compliance, the human rights instruments propose remedies. It does not matter whether the breaches of human rights are too remote from justiciability, or remedies are persuasive: rectifying any violation is an ordinary expectation governing many relationships,²¹ even those entered into expressly, i.e. without formal agreements. If rights are breached, parties are injured. Consequently, redress²² becomes a *sine qua non*. The lack of employment opportunities in the long term, for instance, is baffling because, as often postulated, employment rates and upward labour mobility can be on a par with or higher than those of other immigrants, when refugees acquire country-specific competencies.²³ Using an example from education, according to the AFI report 2016:03,²⁴ more immigrants than people from the majority population with Masters Degrees have a strong desire to work in research or study for PhDs, but fewer succeed in finding employment in higher education. Under the Gap, time spent in the Nordics, new education and workplace experience obtained mainly through various short-term labour-market-orientated courses, can help but does not always do so.²⁵ The various programmes and measures taken by the authorities are palliative and not curative. In the Nordics, nearly half of the refugees spend most of their productive years grappling unsuccessfully with the Gap, i.e. no scintilla of success is registered. To understand why this occurs, it is necessary to carefully analyse the different elements of the Gap’s complexities to explore whether refugees, authorities, policies, or other factors are to blame.

²⁰ *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe*, CSCE (extracts) 29 June 1990, I(1).

²¹ See for example, *Final Act of the Helsinki Summit of the Conference on Security and Co-operation in Europe* (extracts) (1 August 1975), Question relating to security in Europe, Article X.

²² See, inter alia, *Council of Europe, European Convention on Human Rights as amended by Protocols Number 11 and 14, supplemented by Protocols Number 1, 4, 6, 7, 12 and 13* (adopted 4 November 1950, entered into force 1953) art 13.

²³ *Ibid* (n16)

²⁴ T Maximova-Mentzoni et al., ‘«Å være Utlanding er ingen Fordel» Karriereløp og barrierer for innvandrere i norsk akademia’, *AFI-rapport 2016:03* ((Arbeidsforskningsinstituttet (AFI)) (To be a Foreigner has no Advantage: Career Paths and Barriers for Immigrants in Norwegian Education System, Nordic Institute for Studies in Innovation, Research and Education), XI-XIV.

²⁵ Report by the Open Society Foundations, *Somalis in Oslo* (New York 2013).

Refugees are subjects of complex, normative international human rights and humanitarian laws.²⁶ After resettlement, however, the word ‘refugee’ is often understood asymmetrically. The legal meaning is often lost. Refugees are victims of persecution deserving international protection, but the forces that shape their everyday experiences do not conform to countries’ human rights obligations. When economic concerns, often mixed with anxieties about overall migration issues, are given more weight than persecution itself, refugees’ rights are trampled underfoot.²⁷ Refugees are left to the grace and good nature of the authorities, whose aims and objectives are extremely diverse, and often ambivalent. In such an atmosphere, international human rights obligations and duties are given little consideration, despite their binding legal force.

However, the Nordics are complex societies in which the rule of law and respect for human rights flourish. This implies that any violation of human rights through acts of omission or commission,²⁸ and the deliberate neglect of human rights obligations, can be acknowledged and a panacea sought using reasoning from the international human rights approach. In the long-term, when the labour market absorbs only about half of the refugees, of whom nearly half²⁹ work less than one hour per week, those excluded suffer from the Gap in the form of involuntary, ongoing unemployment. When the exclusion becomes persistent and not transient, some of the main pillars of international human rights law are violated. Values³⁰ such as equality and non-

²⁶ UNGA, *Convention Relating to the Status of Refugees* (adopted 28 July 1951, entered into force 22 April 1954, United Nations Treaty Series, Vol 189, 137) (Refugee Convention).

²⁷ Refugees can be portrayed as voluntary (proactive) or involuntary (reactive) migrants but the two terminologies are at continuum. See for example, AH Richmond, ‘Reactive Migration: Sociological Perspectives on Refugee Movements’ (1993) 6 (1) *Journal of Refugee Studies* 7; A Portes and J Borocz, ‘Contemporary Immigration: Theoretical Perspectives on its Determinants and Mode of Incorporation’ (1989) 23 (3) *International Migration Review* (Special Silver Anniversary Issue: International Migration an Assessment for the 90's) 606.

²⁸ The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1998) 20 *Human Rights Quarterly* 691 (The Maastricht Guidelines); United Nations, *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, UN Doc E/CN.4/1987/17 (The Limburg Principles), Appendix 1.

²⁹ K Henriksen, ‘*Overføringsflyktninger i Norge, Rapporter 7/2012*’ (Resettlement Refugees in Norway, Reports 7/2012) (Statistics Norway, Oslo–Kongsvinger 2012).

³⁰ For human rights values and norms, see for example, H Steiner, P Alston and R Goodman, *International Human Rights in Context: Law, Politics, Morals* (3rd edn OUP 2008) 263-264; D Olowu, ‘Human Rights and the Avoidance of Domestic Implementation: The Phenomenon of Non-Justiciable Constitutional Guarantees’ (2006) 69 *Saskatchewan Law Review* 39, 41 in P O’Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2012) 23.

discrimination, dignity, social justice, capabilities³¹ (individuals' capability to make choices that give meaning to their lives), etc., are trivialized. However, it is such values which the international human rights regime has identified as fundamental and paramount, and therefore give rights their inalienability and imprescriptibility meaning.

This thesis has devised a novel method to answer the primary research question. The Nordic context is given more importance. To apprehend, understand, organize, and convey the hitherto unknown causes, consequences, spill-over effects, and difficulties crafting remedies, this thesis discusses and describes the Gap afresh in the light of international human rights obligations. Can an appeal to law be the missing link between refugees as putative rights holders and the Nordic States as the bearers of obligations to respect, protect and fulfil human rights?

1.2 Background

When wars break out, many thousands of persons are often forced to escape. In 2016, for every minute of the day that passed, 20 people were forcibly displaced, mostly by war.³² Before the year ended, 10.3 million people had been newly displaced, of which 3.4 million became new refugees or asylum seekers, making the total number of refugees globally 22.5 million.³³ The presence of forced migrants (asylum seekers) at the State borders raises anxieties. As a matter of concern, the States, and humanitarian organizations, the UNHCR, react swiftly. But to start from the beginning, what is it that triggers the involuntary flow of populations across territorial borders, of young and old, and of all genders? There is no need for specialized instruments or knowledge to assert with a degree of certainty that war, a social activity, 'an act of violence intended to compel our opponents to fulfill our will',³⁴ is the most undisputed trigger of population flows across jurisdictional borders.

³¹ A Sen, *The Idea of Justice* (Belknap Press 2009); MC Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (The Belknap Press 2006). See also A Sen, 'Capability and Well-Being' in MC Nussbaum and A Sen (eds), *The Quality of life* (Clarendon Press 1993) 30-53;

³² UNHCR, *Global Trends: Forced Displacement in 2016* < www.unhcr.org/globaltrends2016/ > accessed 1 August 2017.

³³ Ibid.

³⁴ The definition is provided by Clausewitz in M Kaldor, *New and Old Wars: Organized Violence in a Global Era* (3rd edn Polity Press 2012) 17.

Why wars break out, why some people flee and not others, and why some return and not others, are not part of this thesis. However, the causes of wars are worth briefly mentioning: ‘policies and practices of oppressive and racist regimes... aggression, colonialism... alien domination, foreign intervention and occupation’.³⁵ Other causes are unimaginable human rights violations that shock human conscience: for example, subjecting persons ‘to torture or to cruel, inhuman or degrading treatment or punishment’,³⁶ and persecution where individuals are treated as *homo sacer*,³⁷ i.e., States can exterminate citizens labelled ‘opponents’ with impunity. The exception is found in a few cases dealt with by the International Criminal Court and the other *ad hoc* courts.³⁸ In cases of war and severe human rights abuses, victims can escape and seek international protection. They apply for asylum which can end in refugee status.³⁹ Once refugee status has been granted, other rights like access to ‘gainful employment’⁴⁰ and ‘social protection’⁴¹ must be provided by the host country or humanitarian organizations.

Protection from persecution can be enjoyed only within the confines of statutory or territorial jurisdiction due to the principle of territorial supremacy. Even in cases where forced migrants have no intention of lodging an asylum case, or do not know how to apply, immigration laws demand the registration of all newcomers with the authorities. Failure to register can result in a situation where a forced migrant is mistakenly accused of illegal entry or illegal stay. Applicants can get protection only if they qualify for asylum, and are eventually granted refugee status. Refugee status is offered only upon conviction that the applicant was persecuted, and that the persecution will continue if ‘*refoulment*’⁴² occurs. Although offering refugee status is a

³⁵ UNGA Res/36/148 (16 December 1981).

³⁶ UNGA Res 217 A (III) (adopted 10 December 1948) (UDHR) art 5.

³⁷ D Chatty and P Marfleet, ‘Conceptual Problems in Forced Migrations’ (2013) 32 (2) *Refugee Survey Quarterly* 1, 13.

³⁸ For example, the International Criminal Tribunal for the former Yugoslavia (ICTY); The International Criminal Tribunal for Rwanda (ICTR); Nuremberg Trials; The International Military Tribunal for the Far East (Tokyo Trial or Tokyo War Crimes Tribunal); The extraordinary Chambers in the Courts of Cambodia (ECCC), The Khmer Rouge Tribunal or the Cambodia Tribunal.

³⁹ UDHR art14 (1) entitles a person to seek and to enjoy asylum in other countries if persecuted.

⁴⁰ Refugee Convention art 17.

⁴¹ Ibid articles 20-24.

⁴² Refugee Convention Articles 32(1), 33 (1) prohibits expulsion of persons back to the country of origin except in circumstances where such a person(s) poses danger to the security of the host country, or the person committed a serious crime like genocide.

discretionary act by the host countries, the duty to protect refugees is an international legal obligation binding all countries, even those which are yet to sign and ratify the Refugee Convention⁴³ and its Protocol.⁴⁴

Some refugees may still be unsafe after obtaining refugee status in the first country of asylum.⁴⁵ For instance, of the 22.5 million registered refugees in 2016, the UNHCR recommended 162,575 for resettlement, of whom 125,835 went on to be resettled.⁴⁶ This was less than one per cent i.e. 0.72 of the total.⁴⁷ In the case of Norway, from the 1970s to 2012, resettlement refugees made up only about 15 per cent of all refugees living there.⁴⁸ Resettlement into third, distant and non-adjacent countries is one of the durable solutions the UNHCR has for some members of the most vulnerable groups of refugees. The Nordics, in conjunction with the UNHCR, actively participate in the programme where such refugees are resettled on a quota basis. After recommendations from the UNHCR, inter alia, countries decide the quota (number), region, gender, etc. In 2016, for example, the UNHCR recommended a total of 3,170 refugees to be resettled in Norway, of whom 3,001 (95 per cent) were from one country, Syria.⁴⁹ Such a big quota from one country clearly suggests a link to the war in that country at the time.

1.2.1 Short-term: endogenous causes

Upon resettlement, refugees immediately start to actively participate in the many programmes intended to make them competent and active members of the labour market. The first programme involves acquiring knowledge of the local language and society. In Norway, for instance, it is both a right and an obligation for refugees aged 16 to 67 to learn the Norwegian

⁴³ Refugee Convention art 42(1)

⁴⁴ UNGA Res 2198 (XXI) (adopted 31 January 1967, entered into force 4 October 1967) (Refugee Protocol) art VII (1).

⁴⁵ UNHCR, *Submissions and Departures since 2013* < www.unhcr.org/resettlement.html > accessed 02 August 2017.

⁴⁶ *ibid.*

⁴⁷ $(162,575/22,500,000) \times 100 = \text{about } 0.72.$

⁴⁸ K Henriksen *ibid* (n29) 13.

⁴⁹ *Utlendingsdirektoratet (UDI), 'Overforingsflyktninger etter Statsborgerskap, Innvilgelser og Ankomster'* (2016) (The Directorate of Immigration, 'UDI', 'Resettlement Refugees According to Nationality, Status Accorded/Granted and Arrivals 2016') < www.udi.no/en/statistics-and-analysis/statistics/overforingsflyktninger-etter-statsborgerskap-innvilgelser-og-ankomster-2016/ > Accessed 04 August 2017.

language and social life (Norwegian life and society) for a minimum of 600 hours.⁵⁰ It is a period of two years which can be extended to 2,400⁵¹ hours by the municipality if the need arises.⁵² However, irrespective of the number of programmes duly completed and the time spent in Norway, nearly half of the refugees do not satisfactorily participate in gainful employment afterwards. The experience is the same whether a refugee is resettled in Denmark,⁵³ Finland⁵⁴ or Sweden.⁵⁵ A gap in earnings and in other areas of life is thus created, and is of concern.⁵⁶ In many countries that resettle substantial number of refugees, for example, the United States of America, Canada and Australia, literature about the Gap considers *short-term* to be six months to three years.⁵⁷ For the sake of simplicity, this thesis considers short-term to be two to five years.

‘On average, it takes refugees up to 20 years to have a similar employment rate as the native born. In the first five years after arrival, only one in four refugees is employed, the lowest of all migrant groups.’⁵⁸ *Five* years may sound hypothetical but it takes five years for an immigrant to obtain long-term residence permit in Sweden.⁵⁹ Furthermore, the process of entering the Swedish labour market for the first time i.e. accessing a ‘first real job’, is slow for non-labour migrants (refugees and relatives of refugees).⁶⁰ When the employment rate of migrants from Bosnia and Herzegovina reached 70 per cent in *five* years after their initial

⁵⁰ Lov (Nr 80 av 4 Juli 2013) om Introduksjonsordning og Norskoppl ring for Nyankomne Innvandrere (Introduksjonsloven) (The Introduction Act Number 80, 4 July 2003) s17.

⁵¹ (2400/300) = 8 years.

⁵² Norway, The Introduction Act Number 80 (4 July 2013) s18 para 2.

⁵³ ML Schultz-Nielsen, ‘Labour Market Integration of Refugees in Denmark’ in B Bratsberg et al., *Nordic Economic Policy Review: Labour Market Integration in the Nordic Countries* (TemaNord 2017:520, Nordic Council of Ministers) 55-90.

⁵⁴ M Sarvim ki, ‘Labour Market Integration of Refugees in Finland’ in B Bratsberg et al., *Nordic Economic Policy Review: Labour Market Integration in the Nordic Countries* (TemaNord 2017:520, Nordic Council of Ministers 2017) 91-114.

⁵⁵ Iceland is not part of the study although it is a Nordic country and resettles refugees.

⁵⁶ See, for example, E Ott, PDES/2013/16.

⁵⁷ Ibid para 12.

⁵⁸ J-C Dumont (OECD) et al., *How are refugees faring on the labour market in Europe? A first evaluation based on the 2014 EU Labour Force Survey ad hoc module* (Working Paper 1/2016 European Union and OECD 2016) 6.

⁵⁹ P Bevelander et al., *Scandinavia’s Population Groups Originating from Developing Countries: Challenge and Integration* (TemaNord 2013:561, Nordic Council of Minister 2013) 186.

⁶⁰ O  slund, A Forslund and L Liljeberg, ‘Labour market entry of non-labour migrants – Swedish evidence’ in B Bratsberg et al., *Nordic Economic Review: Labour Market Integration in the Nordic Countries* (TemaNord 2017:520, Nordic Council of Ministers 2017) 115- 158, 115.

immigration to Sweden, they were rated ‘rapid climbers’ since it takes other immigrants an average of 20-25 years to reach 60 to 70 per cent employment rates.⁶¹ When the employment rate of immigrants from the Horn of Africa exceeded 70 per cent, it became a surprise since ‘people from this part of the world have a poor average position in the labour market’.⁶² Because of the ‘selection problems’, however, the high employment numbers must be interpreted with caution since migrants who fail to establish themselves on the labour market are more likely to return to their countries of origin or relocate to other countries.⁶³

In Denmark, most labour migrants emigrated after *five* years of stay but the rate was modest among refugees and family reunited with refugees.⁶⁴ Again, a *five-year*’s period was chosen as the most appropriate period to study the Gap among immigrants who arrived between 1997 and 2011. The three cohorts of refugees and family member re-unified with refugees had arrived between 1997-2001, 2002-2006 and 2007-2011, all aged 17 to 36, and all had been born between 1961 and 1987.⁶⁵ Employment rates, annual earnings and transfer payments revealed that refugees labour market attachment improved with years of residence, but it was still low. Labour market participation reached its apex after eight years at around 55 per cent, and it seemed to start to decline.⁶⁶ ‘Therefore, even after 10-15 years of residence, there is still an appreciable gap for refugees up to the employment level not only for natives in general, but also for low-skilled natives and family reunified with immigrants’.⁶⁷ Again, because refugees are free to move after the introduction period (three years), analysis showed that after *five* years, only about 25 percent moved from the municipalities they were assigned to when they arrived in Denmark.

⁶¹ Ibid 139.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ ML Schultz-Nielsen, ‘Labour Market Integration of Refugees in Denmark’ in B Bratsberg et al., *Nordic Economic Review: Labour Market Integration in the Nordic Countries* (TemaNord 2017:520, Nordic Council of Ministers 2017) 55-89, 70.

⁶⁵ ML Schultz-Nielsen *ibid* 66.

⁶⁶ ML Schultz-Nielsen, ‘Labour Market Integration of Refugees in Denmark’ in B Bratsberg et al., *Nordic Economic Review: Labour Market Integration in the Nordic Countries* (TemaNord 2017:520, Nordic Council of Ministers 2017) 55-89, 72.

⁶⁷ Ibid 72.

The experience from Norway, on the other hand, points in a different direction. After *five* to ten years of residence, ‘virtually all immigrant groups from low-income countries – regardless of gender and admission class, experience declining employment rates and increasing social insurance dependency rates relative to natives with shared characteristics’.⁶⁸ Longitudinal analyses indicate that labour market integration of immigrants from low-income countries ‘tends to lose steam after just a few years in Norway, and that the integration process then goes into reverse’.⁶⁹ The study sharply contrasts ‘European cross-section evidence suggesting that the immigrant-native employment differentials are *reduced* with years since migration’.⁷⁰ Five years therefore is a reasonable period to start to study the Gap.

In the short term, the Gap is universal, i.e. it affects all refugees in all countries in similar ways, and is unavoidable because of endogenous factors. Universally, causes of high rates of unemployment in the short term are numerous. However, poorly designed, poorly monitored and ineffective labour market programmes, combined with policies which serve the governments’ own objectives rather than those of the refugees, can play an important role.⁷¹ Other often-postulated causes include a lack of local language proficiency, lack of helpful local social networks, additional support refugees get⁷² (perhaps which make refugees reluctant to look for jobs as soon as they can), not knowing how and where to look for jobs, lack of education or earlier education which is ‘inconvertible’, lack of workplace experience or experience which does not match that required by the new country,⁷³ poor health (due to trauma and other poor coping mechanisms, for instance), and so on. Most of these causes are endogenous and could even be treated as transitory. With some assistance, such as access to education and training, refugees can do much to overcome the endogenous causes of the Gap. The problem arises in the long-term, when the Gap defies, and becomes immune to, most of the attempted solutions.

⁶⁸ B Bratsberg, O Raaum and K Røed, ‘Immigrant Labor Market Integration across Admission Classes’ in B Bratsberg et al., *Nordic Economic Policy Review: Labor Market Integration in the Nordic Countries* (TemaNord 2017:520, Nordic Council of Ministers 2017) 17- 54, 49.

⁶⁹ Ibid.

⁷⁰ Ibid (n 68). See also C Dustmann et al., ‘Referral-based job search networks’ (2016) 83 (2) *The Review of Economic Studies* 514-46; J-C Dumont et al., *How are refugees faring on the labour market in Europe? A first evaluation based on the 2014 EU LFS* (Working Paper 1/2106, European Union and OECD 2016).

⁷¹ E Ott, PDES2013/16 para 12.

⁷² E Ott, PDES2013/16 para 32.

⁷³ Ibid para 27.

1.2.2 Long-term: exogenous causes

In the long term, refugees are expected to close the gap created in the short-term. Except for low wages and occupation status, the Gap tends to reasonably attenuate in the United States of America,⁷⁴ Canada and Australia.⁷⁵ This could perhaps be due to the differences in the ways the labour markets are organized and the relative ease of becoming fluent in the local language(s) if it is English. In the long term (i.e. seven years or more for the purposes of this thesis), the Gap continues to affect about 50 per cent of the refugees. Seven years is also random. In the first place, the number is chosen because of convenience. However, it is the minimum legal period required to apply permanent residence permit for refugees and reunified members of refugees in Denmark.⁷⁶ In Norway too, the minimum period required to apply for citizenship is *seven* years of continuous stay.⁷⁷ Common sense has it that after seven years of uninterrupted stay in a country, an immigrant is, on average, well placed to have gathered enough cues about that society. So, seven years as long-term may not be accidental as it may look at the surface.

At that moment, the Gap has become disquieting, as all expectations have pointed to attenuation, but the problem persists. The causes by this point have become exogenous, i.e. they are mostly externally located and determined. They are intertwined and interconnected, and include ‘attitudinal and institutional factors of resistance along boundaries of employment market’⁷⁸ and discrimination,⁷⁹ *inter alia*. When refugees’ arrival coincides with a low point in the economic cycle or a poor business cycle, for example, recession, the Gap becomes more

⁷⁴ P Connor, ‘Explaining the Refugee Gap: Economic Outcomes of Refugees versus Other Migrants’ (2010) 23 (3) *Journal of Refugee Studies* 377.

⁷⁵ E Ott, PDES/2013/16.

⁷⁶ P Bevelander et al., *Scandinavia’s Population Groups Originating from Developing Countries: Change and Integration* (TemaNord 2013:561, Nordic Council of Ministers) 19, 14.

⁷⁷ Ibid 19.

⁷⁸ K Valtonen, ‘Social Work with Immigrants and Refugees: Developing a Participation-Based Framework for Anti-Oppressive Practice’ (2001) *British Journal of Social Work* 955 in E Ott, PDES2013/16, 12.

⁷⁹ G Hugo, ‘The economic contribution of humanitarian settlers in Australia’ (2013) *International Migration* cited in E Ott, PDES2013/16’, 12; O Åslund, A Forslund and L Liljeberg, ‘Labour market entry of non-labour migrants – Swedish evidence’ in B Bratsberg et al., *Nordic Economic Review: Labour Market Integration in the Nordic Countries* (TemaNord 2017:520, Nordic Council of Ministers 2017) 115- 158, 148.

pronounced.⁸⁰ However, the more likely a person [refugee] is to be in active employment, the better his or her chances of escaping poverty, and *vice versa*: the longer a person [refugee] stays out of gainful employment, the more likely he or she is to remain in poverty.⁸¹

When the Gap defies most of the programmes designed to ameliorate it, novel and disparate approaches to comprehend its complexity become *sine qua non*. In the long term, the Gap can qualify as a breach and a violation of international human rights principles and norms. If discrimination causes part of the Gap, for instance, international and regional as well as domestic anti-discrimination laws are breached. Again, the Gap challenges the norms of equality as a human rights concept grounded in international human rights instruments.⁸² ‘All human beings are born free and equal in dignity and rights’⁸³ and ‘...all the rights and freedoms set forth in the Declaration...’ shall be enjoyed by humanity ‘without any distinction of any kind...’⁸⁴ Following that reasoning, the Gap if unchecked could be violating some of the fundamental principles found in the Universal Declaration of Human Rights. Regionally, all forms and grounds of discrimination leading to violation of equality rights are prohibited.⁸⁵ Equality as a human rights principle is also protected by the Norwegian constitution⁸⁶ and the Swedish constitution.⁸⁷ In Finland, discrimination without an ‘acceptable reason’ is prohibited.⁸⁸ Because the Gap has defied solutions constructed using traditional methods i.e. qualitative and quantitative, there is a clear gap in knowledge. From the point of view of academic inquiry, the need to mitigate the Gap is a call to which this thesis is responding. The application of novel methods, like the

⁸⁰ E Ott, PDES2013/16, 13-14; B Bratsberg, O Raaum and K Røed, *Immigrant Labor Market Integration across Admission Classes* (Discussion Paper Number 10513 IZA January 2017).

⁸¹ RJA Muffels, P Tsakloglou and DG Mayes (eds.), *Social Exclusion in European Welfare States* (Edward Elgar, 2002) 74.

⁸² UNGA, *Charter of the United Nations and Statute of the International Court of Justice* (signed 26 June 1945, entered into force 24 October 1945); UDHR art 1.

⁸³ UDHR.

⁸⁴ UDHR art 2.

⁸⁵ EU, *Charter of Fundamental Rights of the European Union* (26 October 2012, 2012/C 326/02 (ECHR) art 21.

⁸⁶ The Constitution, as laid down on 17 May 1814 by the Constituent Assembly at Eidsvoll and subsequently amended s110 C.

⁸⁷ The Constitution of Sweden: *The Fundamental Laws and the Riksdag Act 2016* (Sveriges Riksdag 2016) <www.riksdagen.se/globalassets/07.-dokument--lagar/the-constitution-of-sweden-160628.pdf> accessed 17 October 2017.

⁸⁸ The Constitutional of Finland, 11 June 1999 (731/1999, amendments up to 1112 / 2011 included) s6.

analysis of the Gap using a human rights approach, and thereafter crafting remedies based on the binding nature of law, promotes a new understanding of the Gap and how to deal with it.

1.3 Gap in knowledge and significance of the thesis

The main aim of this thesis is to find ways by which the Gap can be mitigated without injuring any parties involved. The focus is on the consequences and not the reasons or intentions behind the Gap. After duly synthesising the Gap's intricacies, the thesis contributes to new knowledge in many ways, but three are particularly salient:

- in the *long-term*, the persistence of the Gap is mainly due to a lack of respect of resettlement refugees' economic and social rights, for example, the right to work, by the hypothetical laissez-faire labour market;
- failure by authorities to craft appropriate remedies based on universally acknowledged human rights principles and norms, like dignity, autonomy, equality, non-discrimination, etc., in areas of employment and promotion, and;
- The constant and extensive use of qualitative and quantitative methods to study the Gap is intended not to reject the null hypothesis. In other words, the two methods are used to confirm the Gap's existence and the degree of its unbridled tenacity, but not to formulate legally binding remedies.

Consequently, the solutions proposed do not mitigate it substantially. Could it be that the solutions are premised on wrong propositions? For example, proposing the same and similar solutions to the different causes whether in the *short-term* or the *long-term* has its own limitations. Refugees, like the rest of the population, constantly evolve and advance in knowledge, and acquire country-specific competencies i.e. upgrade their competences. To constantly blame the lack of language proficiency when refugees have lived in a country continuously for over a decade, have completed the compulsory language training programme, have participated in various short-term labour-market oriented courses or have even completed higher education, etc., but still cannot find work, can be based on propositions nearing indifference. New ways of tackling the Gap are needed. As a necessity therefore, this thesis introduces new and disparate techniques into the field. The new tools of analyzing the causes,

effects, and solutions in the long term, and what causes the failure of the previously suggested solutions, mean that human rights became *sine qua non*. Specifically, the thesis:

- Introduces human rights discourse as a different tool to assess the extent to which the concerned States respect refugees' economic and social rights after resettlement;
- uses principles and norms developed from human rights reasoning to explain why resolving the Gap has remained only a *desideratum* despite the resources available; and
- Crafts remedies using legal tools while laying less emphasis on the remedies developed through qualitative and quantitative methods, which remain declaratory.

International human rights law concepts, regional as well as domestic law provisions, are applied to gain theoretical and empirical knowledge of the Gap. Governments, Non-government Organizations and refugees themselves relentlessly grope for durable solutions but with only minimal success. It seems they are all trapped in the labyrinth. For long-term solutions therefore, the thesis rejects the often-postulated hypotheses and other assumptions which constantly attribute failure to dislodge the Gap to the actions of individual refugees.

Under the Gap, refugees inevitably become social clients who remain dependent on means-calculated welfare provisions. But continuous enjoyment of welfare benefits inevitably increases welfare chauvinism and welfare populism, where immigration and the ready access of foreigners to social benefits is rejected.⁸⁹ The entrapped refugees feel the negative impacts of remaining on welfare benefits which include stigma, loss of self-respect and personal dignity, a sense of 'guilt, of shame, of personal fault or failure', and feeling 'the sensation of second class citizenship that results from discrimination'.⁹⁰ As noted by Richard Titmuss, to claim means-tested benefits constitutes a self-declaration of failure, of inadequacy, of poverty; a demonstration of the

⁸⁹ W de Koster, P Achterberg and J van der Waal, 'The New Right and the Welfare State: The Electoral Relevance of Welfare Chauvinism and Welfare Populism in the Netherlands' (2013) 34 (3) *International Political Science Review*.

⁹⁰ A Pratt, 'Universalism or Selectivism? The Provision of Services in the Modern Welfare State' in M Lavalette and A Pratt (eds), *Social Policy: A Conceptual and Theoretical Introduction* (SAGE Publications 1997)196, 203.

claimant's inability to cope in a competitive market economy.⁹¹ The psychological damage inflicted on the victims is incalculable.⁹²

It is claimed that universal welfare regimes do not create 'black hole of democracy', i.e. situations where 'citizens find themselves faced with an administration or system of rules which no one really understands, and in which no one can be held responsible.'⁹³ At times, refugees under the Gap experience the discretionally action of welfare administrators when they are treated differently from other welfare clients.⁹⁴ For instance, one newspaper reported in 2016 that most of the laws governing the welfare system in Norway were outdated, the main welfare administrators i.e. Norwegian Labour and Welfare Administration (NAV) were embroiled in 'a jungle of rules or regulations' despite the rising unemployment.⁹⁵ The means-tested benefits refugees live on for quite a substantial part of their lives is contested i.e. it violates a citizen's rights of integrity 'either in the means-tested itself, or in the verification checks which follows'...and the principle of 'equal concern and respect' ceases to exist.⁹⁶ To qualify for means-tested benefits, people must prove that it was not their 'fault' or 'responsibility', and this makes such tests much more arbitrary and inequitable than commonly presumed.⁹⁷ Through an appeal to human rights, effective remedies to reverse the consequences of the Gap can be realized.

1.4 Purpose, method, and methodology

The overarching aim of this section is to explore, catch and synthesize the ideas and issues embedded in the nature and form of the Gap; and to undertake minute examination of the

⁹¹ Ibid 203.

⁹² Ibid.

⁹³ B Rothstein, 'The Political and Moral Logic of the Universal Welfare State' in S Leibfried and S Mau (eds), *Welfare States: Construction, Deconstruction, Reconstruction. Analytical Approach*, Vol 1 (Edward Elgar 2008) 660, 677.

⁹⁴ See for example, AB Djuve and KR Tronstad, 'Innvandrere I Praksis: Om Likeverdig Tjenestetilbud i NAV' (Fafo-rapport 2011:07, Oslo 2011) ('Immigrants in Practice: About Equal Services in NAV'. Fafo-report 2011:07).

⁹⁵ Støren A Wedén, 'Arbeidsministeren ut mot «regel-jungelen» i Nav – Mye av regelverket er gått ut på dato', VG (23 February 2016) (The Minister of Labour is against 'the jungle of rules' - Most of the regulations were outdated) < www.vg.no/nyheter/innenriks/nav/arbeidsministeren-ut-mot-regel-jungelen-i-nav/a/23622711/ > accessed 17 September 2017.

⁹⁶ B Rothstein *ibid* (n 93), 678.

⁹⁷ G Standing, *Basic Income: a Guide for the Open-minded* (Yale University Press 2017) 7.

essential elements of the methods used to study and interpret it. Because of the Gap's multifariousness in causes, effects and the quest for solutions, the thesis uses a multi-disciplinary approach. Different and sometimes distinct disciplines like economics, sociology, social policy, and refugee integration policies, etc., are analyzed with reference to the research hypothesis. The discrete sources of data were examined, determined, and merged into a distinct thesis which is the first of its kind, based on human rights. International human rights law techniques and methods of examining, studying, and investigating States' obligations and duties to respect, protect, fulfil, and promote human rights, and the violation and rectification of these rights, are employed at an interdisciplinary⁹⁸ level. Without an interdisciplinary approach, a fair and balanced conclusion cannot be reached, because of the nature of the Gap. If two or more methods are used, they often complement each other. This type of analysis would not be possible from an application of either discipline in isolation. Generally, multi-, and interdisciplinary research aims to transcend disciplinary boundaries by taking as the focus the subject area of law in society.

International human rights law is applied to apprehend the intricacies involved in interpreting the Gap. Human rights principles are interpreted in such a way as to produce consistency, and to give natural meaning to, for example, the right to work as grounded in, *inter alia*, the Nordics' national constitutions, the International Covenant on Economic, Social and Cultural Rights,⁹⁹ General Comment Number 18,¹⁰⁰ Universal Declaration of Human Rights,¹⁰¹ the European Social Charter and its revised version, etc. Human rights are framed in legal text which should not be interpreted as imposing only moral duties, pitting States as duty-bearers against refugees as putative rights-holders. The international community duly and thoroughly negotiated the international human rights conventions and treaties, etc. The Committee on Economic, Social and Cultural Rights (CESCR), for example, monitors the implementation of the International Covenant on Economic, Social and Cultural Rights and its Optional Protocol,

⁹⁸ A quick analysis of interdisciplinary research, see Janet Weinstein, 'Coming of Age: Recognising the Importance of Interdisciplinary Education in Law Practice' (1999) 74 *Washington Law Review* 319, 353 in M Salter and J Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Essex 2007), 133.

⁹⁹ Art 6.

¹⁰⁰ From the United Nations Committee on Economic, Social and Cultural Rights.

¹⁰¹ Art 23(1).

and issues interpretations of its provisions using General Comments. Societies have agreed to have human rights because they have universal applicability, provide consistency in interpretation and are predictable in operation.

Much as human rights, like the right to work, equality, dignity, and non-discrimination, etc. can be loose in scope and content, comparing them to mere abstract concepts is erroneous because they have practical intentions and purposes for all human beings. If human rights documents are interpreted as ‘living instruments’ to reflect the ‘current situation’, this can lead to failure to respect the rights protected, the loss of the original meaning and purpose of the concepts therein, and the creation of a kind of vacuum in which violators impose their values arbitrarily. Consequently, remedies based on human rights concepts must carry with them, and contain within themselves, justiciable elements, which lead to social justice.

Accounting for and providing a legitimate aim of respect for and fulfilment of human rights is a duty. Because all human rights are ‘universal, indivisible, and interdependent and interrelated’ and the ‘international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis’.¹⁰² States have an obligation to protect and defend them without any distinction or laxity.¹⁰³ By combining an interpretation of social and economic human rights principles and norms with some elements of socio-economic, socio-political and national social policy analyses, a new picture of the causes of the Gap, and the weaknesses of the sought-after solutions, emerges. For example, some institutions dealing with the Gap may not be best-suited to providing solutions as they are under the control of an ambivalent government. As a general reminder, respect for human rights, which may even require constitutional dialogue,¹⁰⁴ is a necessary condition because it reminds States of the responsibility or obligation to respect the rights.

Additionally, the provision of disaggregated, sufficient and significant statistical data by authorities can help in designing policies to attenuate the Gap if treated as a legal or human

¹⁰² UNGA, *Vienna Declaration and Programme of Action* (adopted 25 June 1993) para 5. See also M Langford, B Porter, R Brown, and J Rossi (eds), *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (Pretoria University Law Press 2016) 2.

¹⁰³ Ibid.

¹⁰⁴ See for example, arguments for constitutional dialogue in Mark Tushnet, ‘Dialogical Judicial Review’ (2008) 61 *Arkansas Law Review* 205, 206 in P O’Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2012) 174.

rights requirement. Furthermore, scrutiny of the maximum available resources (domestic and international) as stipulated by the International Covenant on Economic, Social and Cultural Rights,¹⁰⁵ along with budgetary analysis to factually assess and ascertain allocation against per capita spending, among others, can be important tools in understanding the necessity of the law as a means of solving complex human rights issues with reference to the Gap. Because the Gap cannot just be wished away, its mitigation requires, *inter alia*, serious, meticulous, targeted, and meaningful budgetary resource allocation by the executive and the legislature. For example, to prevent discrimination - one of the causes of the Gap – the authorities can pick guidance from the European Convention on Human Rights¹⁰⁶ taken together with Protocol Number 12¹⁰⁷ to the European Convention on Human Rights and the Revised European Social Charter (RESC).¹⁰⁸ Through the law, effective remedies such as compensating refugees for lost earnings can be pursued because they are legally grounded.¹⁰⁹ The law can be used to reform institutions and vet employees entrusted with management of refugees but who fail to deliver. To avoid falling victims to a situation comparable to a vacuum of human rights law, the existing legal texts are analyzed and interpreted systematically, because they are authoritative. Specifically, the thesis:

- Asks whether the Gap and its effects can be interpreted as violations of refugees' economic and social rights;
- contemplates whether remedies based on international human rights principles and norms, analyzed contextually, can be crafted; and
- Evaluates the extent to which the crafted remedies can be effective in assisting refugees to gain access to the labour market.

Finding balanced answers to the above questions requires, *inter alia*, justification of the robustness of the method and methodology applied. The thesis fully expounds the rationale for choosing international human rights as the prism through which the Gap can better be analyzed, and through which remedies are proposed. Why the thesis chooses a multi-disciplinary approach

¹⁰⁵ Art 2(1).

¹⁰⁶ *Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR) art 14.

¹⁰⁷ Art 1.

¹⁰⁸ Art E.

¹⁰⁹ ECHR art 13.

based on legal principles as the preferred *modus operandi* is elucidated. The essence, the true substance of the Gap is a phenomenon characterized by appallingly low levels of employment, abysmal income, and untapped potential of refugees. What do international human rights instruments say about this abyss, i.e. the Gap?

1.4.1 Primary sources

Under international human rights instruments, the Gap, in the long term, results to a large degree from acts of omission and commission as stipulated by the Maastricht Guidelines,¹¹⁰ the Limburg Principles,¹¹¹ and the International Covenant on Economic, Social and Cultural Rights and its corresponding Protocol,¹¹² *inter alia*. Other primary sources are the United Nations Charter of 1945 and the Universal Declaration of Human Rights of 1948, the Refugee Convention¹¹³ and its additional protocol,¹¹⁴ the International Convention on Elimination of All Forms of Racial Discrimination,¹¹⁵ the Convention on the Rights of the Child,¹¹⁶ the Convention on the Elimination of all Forms of Discrimination against Women,¹¹⁷ the Convention on Rights of Persons with Disabilities,¹¹⁸ the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families¹¹⁹, etc. The General Comments of the Committee on Economic, Social and Cultural Rights and the Universal Periodic Reviews (UPRs) of the United Nations Human Rights Council, etc., provides information on human rights performance in all 193 UN Member States. Primary sources, in short, provide direct and

¹¹⁰ The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1998) 20 *Human Rights Quarterly* 691 (Maastricht Guidelines).

¹¹¹ United Nations, 'Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights', Document E/CN.4/1987/17, Annex; (1987) 9 *Human Rights Quarterly* 122.

¹¹² UNGA Res A/63/117 (5 March 2009) (Optional Protocol to the International Covenant on Economic, Social and Cultural Rights).

¹¹³ UNGA, United Nations Treat Series, Volume 189, 137 (28 July 1951).

¹¹⁴ UNGA, United Nations Treaty Series, Volume 606, 267 (31 January 1967) (Protocol Relating to the Status of Refugees).

¹¹⁵ UNGA Res A/2106 (XX) (21 December 1965, entered into force: 4 January 1969).

¹¹⁶ UNGA Res A/44/25 (20 November 1989, entered into force: 2 September 1990).

¹¹⁷ UNGA Res A/34/180 (18 December 1979, entered into force: 3 September 1981).

¹¹⁸ UNGA Res A/61/106 (13 December 2006).

¹¹⁹ UNGA A/RES/45/158 (18 December 1990, entered into force 1 July 2003).

authoritative sources of information, and are expected to be less opinionated because they go through a thorough process of review.

Additional sources of primary information are provided by the work of the Council of Europe (CoE), the European Union Directives, the 1961 European Social Charter¹²⁰ and the 1996 Revised European Social Charter.¹²¹ Analysis of case law from the European Court of Human Rights (ECtHR), along with the Nordic constitutions and a plethora of domestic legislation, does provide extra source of primary information. Norway, for instance, has the Equality and Anti-Discrimination Ombud¹²² and its corresponding appeals court, the Equality, and Anti-Discrimination Tribunal, deals with matters of discrimination. They provide advice and guidance to those who feel they have suffered discrimination or violations of their human rights. The advice given is usually grounded in the work of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) or Convention on Rights of Persons with Disabilities (CRPD) and the International Convention on the Elimination of All Forms of Racial Discrimination.¹²³ In Finland, there is a Non-Discrimination Ombudsman, while Sweden has an Equality Ombudsman. Denmark has the Danish Institute of Human Rights; whose function is to promote and protect human rights including equal treatment. Official reports from government agencies, such as Statistics Norway and Statistics Sweden, or the Norwegian Official Reports (NOU – *‘Norges Offentlige utredninger’*) about integration of refugees, Nordic Council of Ministers, etc., have provided the background information on the Gap.

1.4.2 Secondary sources

The thesis employs secondary sources extensively. They have provided information on the nature and scope of the hypothesis. Authored books, edited and translated books, online journals and other research and working papers, etc., are some examples of secondary material.

¹²⁰ Adopted 18 October 1961 entered into force 26 February 1965 (ETS No. 35).

¹²¹ 3 May 1996 entered into force 1999 Council of Europe (ETS No. 163).

¹²² Ministry of Children and Equality, *The Act on the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal* (The Anti-Discrimination Act) < www.regjeringen.no/en/dokumenter/The-Act-on-the-Equality-and-Anti-Discrim/id451952/ > accessed 16 January 2018.

¹²³ Ibid (n 98). See the full Act in Norwegian, *‘Lov om Likestilling- og diskrimineringsombudet og Diskrimineringsnemnda’*, Lov-2017-06-16-15 (Diskrimineringsombudsloven) < <https://lovdata.no/dokument/NL/lov/2017-06-16-50> > accessed 16 January 2018.

The captured words, figures, numbers and graphs, when interpreted according to human rights principles and normative expectations, provide a rich understanding of the Gap and its complexity. Sources of primary and secondary material are used to support the arguments in a thesis. Although they do not provide so much *new* information about the problem, they are nonetheless supportive, and they can be compared to major blood vessels (arteries, capillaries and veins) which enables blood to circulate in our bodies. Because of their importance, primary and secondary sources are used selectively ie according to their supportive role. This thus give credibility to the thesis.

1.4.3 Data, health status and age at time of resettlement

Before all else, the Gap concerns resettlement (quota programme) refugees although there are other groups like family members united with a refugee and children of refugees born in the resettlement country. By the beginning of January 2017, for example, the percentage of the population of Norway with refugee background was 4.1 but only 0.6 per cent were resettlement refugees.¹²⁴ In many instances, literature and authorities treat refugees, members reunited with refugees and offspring of refugees born within the host country as ordinary migrants. For example, the massive flow of labour migrants from Eastern Europe that followed the enlargement of the common European labour market (2004 and 2007) and the autumn 2015 refugee crisis in Europe made *migration* and *integration* a serious topic in the Nordics' politics.¹²⁵ Because quota refugees are generally fewer, differentiating and isolating them from the rest of the migrants may fail to present a clear picture of the Gap. The extent to which rights of immigrants in general are respected plays a complementary role as far as understanding the Nordics' integration policies of resettlement refugees.

The decision to admit resettlement refugees is taken by the government of the third country in conjunction with UNHCR. Through UNHCR Global Resettlement Needs programme,

¹²⁴ Statistics Norway, '*Personner med flyktningbakgrunn*' (persons with refugee background) < www.ssb.no/befolkning/statistikker/flyktninger/aar > accessed 13 March 2018.

¹²⁵ B Bratsberg, O Raaum and K Røed, 'Immigrant labor market integration across admission classes' in B Bratsberg et al., *Nordic Economic Review: Labour Market Integration in the Nordic Countries* (TemaNord 2017:520, Nordic Council of Ministers 2017) 17-54, 18.

various countries which participate in the programme, are contacted.¹²⁶ Refugees are often picked (evacuated) from dangerous areas (war-torn countries) where the many conditions of life are in the extreme. In case of Norway, factors to consider before a refugee is resettled include, inter alia, host country's desire and need to be relieved of the refugee(s), 'burden -sharing', possibility for strategic gain in the form of a solution or improved conditions for refugees not offered resettlement by the host country, UNHCR's capacity to present issues that conform to government's evacuating criteria, the group's degree of vulnerability (for example, vulnerable women in camps), prospect for successful integration, and capacity of the municipality to meet refugees' individual needs.¹²⁷ Urgent cases (handled within 48 hours), medical reasons and families with children (under 18 years of age) can be prioritized.¹²⁸ Before anything else, however, reasonable grounds for international protection and further need for a durable solution must not be doubtable. Credibility assessment is carried out. As such, criminality, substance abuse (drug abuse), etc begets automatic rejection.¹²⁹

Assessing the 'vulnerability' of a refugee is not as easy as it may sound. In 2014, for instance, the quota for Norway was 1,500 places but only 20 places were available for medical reasons.¹³⁰ When Syrian refugees in Turkey were chosen for resettlement, one in four was rejected because of medical reasons.¹³¹ Just like many other government policies, the refugee-migration programme is dynamic. It changes accordingly, and nothing stays fixed. For instance, the quota for Norway was more than doubled from 1,500 in 2015 to over 3,000 in

¹²⁶ See for example, Brochure from Swedish Migration Agency, *Swedish Resettlement Programme 2017* < www.migrationsverket.se/English/About-the-Migration-Agency/Our-mission/The-Swedish-resettlement-programme.html > accessed 15 March 2018.

¹²⁷ 'G-04/2015: Retningslinjer for arbeidet med overføringsflyktninger jf. utlendingsloven § 35, Rundskriv 3 juli 2015' (G-04/2015: Guidelines to work with resettlement refugees, Circular of 3 July 2015) < www.regjeringen.no/no/dokumenter/rundskriv-g-042015-retningslinjer-for-arbeidet-med-overforingsflyktninger-jf.-utlendingsloven--35/id2426422/ > [accessed 16 December 2017]. See also Act on the entry of foreign nationals into the Kingdom of Norway and their stay in the realm (Immigration Act Number 35 of 15 May 2008) s35.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ O Njaastad and AL Kumano-Ensby, 'Vi lar de sykeste flyktninger dø', Norsk Rikskringkasting AS (NRK, Norwegian Broadcasting Corporation) (29 October 2014) (*We let the sickest refugees die*) < www.nrk.no/dokumentar/_vi-lar-de-sykeste-flyktningene-do-1.12008561 > accessed 10 January 2018. See also a documentary film on the same topic, *NRK1 TV Brennpunkt 'UDIs Nåløye'* (28 October 2014). (The Norwegian Directorate for Immigration, 'UDI's Needle's Eye') < <https://tv.nrk.no/serie/brennpunkt/MDUP11001414/28-10-2014> > accessed 10 January 2018.

¹³¹ Ibid.

2016.¹³² About 3,120 refugees were to be resettled.¹³³ 3,000 were to be Syrians divided accordingly: 2,150 from Lebanon, 600 from Turkey, and 250 from Jordan.¹³⁴ The rest of the total (120) were ‘open places’(from the rest of the world) but 30 places had to include Afghan interpreters and their family members.¹³⁵ The ‘Medical Quota’, ie those with life-threatening illnesses and who could not get medical treatment where they were, had been constant for many years and it was going to remain the same in 2015.¹³⁶ In 2016, however, it was increased to 60 places but it had to be part of the 3,000 Syrians.¹³⁷

Sweden too increased its quota from the previously ‘fixed’ 1,900 to 3,400.¹³⁸ These were to be from: Middle East including Turkey and North Africa (mainly Syrians) 1,770, East Africa and the Horn of Africa (mainly Somalis, Eritreans, Ethiopians and Congolese) 830, South Asia (Afghans) 200, and urgent and prioritized cases globally (different nationalities) 600.¹³⁹ If 20 out of 1,000 - 1,500 (2 to 1.3 percent)¹⁴⁰ or 60 out of 3000 (2 percent)¹⁴¹ places are reserved for medical emergencies ie refugees in need of further medical treatment, it means that at the time of resettlement, the majority of the quota are not medically sick. The example from Syria showed that the sickest, the disabled, and those in serious need of medical help were rejected so as not to add extra burden to the healthcare system.¹⁴²

¹³² Ibid.

¹³³ Utlendingsdirektoratet (UDI), ‘Kvoten for overføringsflyktninger 2016 – Kvotesammensetning’ (Det Kongelige Justis- og beredskapsdepartementet ref. 15/5929-MJR, 18.12.2015) (Norwegian Directorate of Immigration, UDI, *The 2016 Quota Composition of Resettlement Refugees*). See also ‘Rundskriv G-04/2015: Retningslinjer for arbeidet med overføringsflyktninger jf. Utlendingsloven § 35’ (Det Kongelige Justis- og beredskapsdepartementet). *Circular G-04/2015: Guidelines for Working with Resettlement Refugees* (The Royal Ministry of Justice and Public Security, cf. the Immigration Act s35).

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ Brochure from Swedish Migration Agency, *Swedish Resettlement Programme 2017* (Swedish Migration Agency) 9 < www.migrationsverket.se/English/About-the-Migration-Agency/Our-mission/The-Swedish-resettlement-programme.html > accessed 15 March 2018.

¹³⁹ Ibid.

¹⁴⁰ $(20/1,000) \times 100 = 2$; $(20/1,500) \times 100 = 1.3$.

¹⁴¹ $(60/3,000) \times 100 = 2$.

¹⁴² Ibid.

Age at time of resettlement and issues of gender

One study in Denmark noted that ‘Among men, the median age for refugees and family reunified with refugees was 28 for both groups, while family members reunified with immigrants tended to be somewhat younger (25).¹⁴³ Another comprehensive report from Statistics Norway showed that resettlement refugees were relatively young: 49 percent were 15-39 years old.¹⁴⁴ Since 1995, for every 10 quota refugees, four to five were children ie they were under 18 years of age.¹⁴⁵ On average, nearly half of all resettlement refugees in Norway were under the age of 18.¹⁴⁶

Men dominated the quota at 54 percent but the distribution was not even.¹⁴⁷ In some groups there were more men than women while in others, the reverse was true. The government later demanded a minimum of 55 percent to be women.¹⁴⁸ Consequently, the percentage resettled in 2009 and 2010 was 56 and 57 respectively.¹⁴⁹ In a February 2012 report from Statistics Norway, 54 per cent of this group were men while 46 per cent were women.¹⁵⁰ In a 2013 letter from the Norwegian Directorate of Immigration (UDI) to the Ministry of Justice and Public Security (*‘Justis- og beredskapsdepartementet’*), women made up 59.8 per cent although the goal was 60.¹⁵¹ The quota for 2015, continued the letter, was likely to be lower because of the Syrian refugees scattered in the Middle-East (Lebanon, Jordan and Turkey).¹⁵² It was further revealed

¹⁴³ ML Schultz-Nielsen, ‘Labour Market Integration of Refugees in Denmark’ in B Bratsberg et al., *Nordic Economic Review: Labour Market Integration in the Nordic Countries* (TemaNord 2017:520 Nordic Council of Ministers 2017) 69.

¹⁴⁴ K Henriksen, ‘*Overføringsflyktninger i Norge*’ (Resettlement Refugees in Norway) (Reports 7/2012 Statistics Norway, Oslo-Kongsvinger 2012) 15.

¹⁴⁵ K Henriksen, ‘*Overføringsflyktninger i Norge*’ (Resettlement Refugees in Norway) (Reports 7/2012 Statistics Norway, Oslo-Kongsvinger 2012) 16.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ K Henriksen, ‘*Overføringsflyktninger i Norge*’ (Resettlement Refugees in Norway) (Reports 7/2012 Statistics Norway, Oslo-Kongsvinger 2012) 5. For the case of the European Union, see J-C Dumont (OECD) et al., *How are refugees faring on the labour market in Europe? A first evaluation based on the 2014 EU Labour Force Survey ad hoc module* (Working Paper 1/2016 European Union and OECD 2016) 11.

¹⁵¹ UDI, ‘*Forslag for kvotefordeling for 2015*’ (Proposal for quota allocation for 2015) (Ref. 13/2696-23/TOE, *Justis- og beredskapsdepartementet*, 29 August 2014).

¹⁵² Ibid.

that priority would go to vulnerable Afghan women in Iran, single mothers with children whose need for international protection was strong and clear, there was continued need for strategic effort, and a high proportion of women/girls and families with children who have integration potentials, were still a priority, etc.

It should however be noted that although some countries prioritize vulnerable and urgent cases, it does not mean that the chosen quota is always the least or the most unemployable. As noted below, reasons for admitting refugees, as the rest of migrants, are diverse:

‘A prominent feature of international migration is that it is strongly dominated by individuals of younger working age, i.e. around 20–35 years of age. Immigration may thus potentially improve public finances, since immigrants typically arrive at the start of the economically productive phase of their lives and the host country did not incur the costs of schooling and subsistence during their childhood. Everything else equal, immigrants will therefore imply net gains for the public finances of the host country, both in the short term after their arrival and over their entire lives’.¹⁵³

Despite the observation, ‘immigrants arriving after they turn thirty seem to have much lower employment rates, conditional on age and years since entry.’¹⁵⁴ ‘The largest “penalty” appears for male refugees arriving in their forties’.¹⁵⁵ Migrant penalty i.e. the disadvantages immigrants face is not erased by the equal number of years of residence, it actually increases with higher skill levels since highly educated immigrants have lower employment rates than highly educated native-born in all EU countries with significant immigrant population.¹⁵⁶

Second generation

They are children of refugees and other immigrants in general born in the host country. Under certain circumstances, their access to employment, promotion once a job is secured, etc.,

¹⁵³ J Ruist, ‘The Fiscal Impact of Refugee Immigration’ in B Bratsberg et al., *Nordic Economic Policy Review: Labour Market Integration in the Nordic Countries* (TemaNord 2017:520 Nordic Council of Ministers 2017) 211-235, 215.

¹⁵⁴ B Bratsberg, O Raaum and K Røed, ‘Immigrant Labor Market Integration across Admission Classes’ in B Bratsberg et al., *Nordic Economic Policy Review: Labour Market Integration in the Nordic Countries* (TemaNord 2017:520 Nordic Council of Ministers 2017) 17-54, 38-39.

¹⁵⁵ Ibid 39

¹⁵⁶ T Huddleston, J Niessen and JD Tjaden, *Using EU Indicators of Immigrant Integration* (Final Report for Directorate-General for Home Affairs, European Commission, Brussels 2013) 15.

may at times resemble that of immigrants who arrived as adults. They generally have better education and their labour market performance rates are often higher than those of their parents. However, when compared with children whose parents have no immigration background, some gaps appear. Integrating young people (offspring of immigrants) is the greatest benchmark of any host country's integration policies:

'In theory, because they were schooled in their parents' host country, children of immigrants should not encounter the same difficulties as adult immigrants who arrived in a foreign country as workers, spouses, partners, members of the family, or as humanitarian migrants. Ultimately, their outcomes should be much the same as those of young people with no migrant background and the same social and demographic profiles. Yet that is not what happens in many host countries, particularly in Europe.'¹⁵⁷

According to David Card, 'The real benchmark for the integration of immigrants is the success of their children'.¹⁵⁸ 'Despite progress over the decade, a significant share of students with a migrant background lack basic skills'.¹⁵⁹ At the age of 15:

'Around 25% of native students born to immigrant parents and 14% of native children of mixed parentage and of children of native-born parents lacked basic reading skills. By contrast, comparable average shares of around 17% of native-born pupils of native- and foreign-born parents struggled with reading literacy at 15 years old across the OECD'.¹⁶⁰

The 2012 mean PISA¹⁶¹ reading scores of 15-year-old students by migration background differed greatly: in Sweden, the score for 'native-born offspring of foreign-born' was about 460 against 495 for 'native-born offspring of native-born'.¹⁶² The corresponding figures in Finland were about 470 against 530 respectively.¹⁶³ In Denmark, the score for 'foreign-born' was about

¹⁵⁷ OECD/European Union, *Indicators of immigrant integration 2015: Settling in* (OECD Publishing Paris 2015) 229.

¹⁵⁸ G Lemaitre, *Educational outcomes of the children of immigrants: background, results, and policy implications* (OECD, International Migration Division, 7 May 2010).

¹⁵⁹ OECD/European Union, *Indicators of immigrant integration 2015: Settling in* (OECD Publishing Paris 2015) 231.

¹⁶⁰ OECD/European Union, *ibid.*

¹⁶¹ Programme for International School Assessment

¹⁶² OECD/European Union, *Indicators of immigrant integration 2015: Settling in* (OECD Publishing Paris 2015, Chapter 13 young people with a migrant background, figure 13.7) 243.

¹⁶³ *Ibid.*

450 against 500 for ‘native-born offspring of native-born’.¹⁶⁴ In Norway, the figure for ‘native-born offspring of foreign-born’ was about 460 against 510 for ‘native-born offspring of native-born’.¹⁶⁵ The average literacy score of immigrant offspring in 2012 was from 271 to 254 points (lower – upper limits) among immigrants and 286 points for offspring of parents born in the host country; and the performance of immigrant offspring was weakest in Scandinavia [the Nordics], *inter alia*.¹⁶⁶

In 2013, the rate at which young people aged 15-24 dropped out of school prematurely was similar in both groups in the OECD with the exception of Finland where the difference was more pronounced.¹⁶⁷ In most OECD countries, immigrants and the native-born offspring of migrants are more likely to be ‘not in employment, education or training’ (NEET), than the children of the native-born.¹⁶⁸ Once disaggregated further in components like “short-term unemployment”, “inactive” and “long-term unemployment”, NEET ‘is a fuller indicator than the unemployment rate of how many and why young people are excluded from the labour market’.¹⁶⁹

‘In most countries, the employment rates of the young population with a migration background have deteriorated since 2007-08 ... the employment situation of immigrant offspring...generally worsened more sharply than that of the offspring of the native-born and the largest drops came in Denmark...’¹⁷⁰ Furthermore, ‘second-generation immigrants with equal residence than non-immigrants show relatively lower outcomes on the labour market in many

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ OECD/European Union, *Indicators of immigrant integration 2015: Settling in* (OECD Publishing Paris 2015, Chapter 13, young people with a migrant background, 248.

¹⁶⁷ Ibid 251.

¹⁶⁸ Ibid 254.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid 260.

EU-15 countries.’¹⁷¹ In short, their education attainment is lower, which may partly explain the lower employment outcomes than the children of natives in most countries.¹⁷²

1.4.4 Interpretation of the material

Just like in any case involving violation of human rights, several reasoning techniques are applied to interpret the relevant material to reach a coherent conclusion. Firstly, the thesis employed inductive reasoning.¹⁷³ General observations about the Gap were made and principles formulated for general application. For example, if refugees wish and do everything they can so that they participate in gainful employment but the labour market still rejects them, the ultimate reasons for the rejection are within the labour market itself. Secondly, the principles developed were deductively¹⁷⁴ reasoned and logically interpreted. For instance, if the children of refugees are over-represented among the poor, it can be deduced that their parents are also poor. It can further be implied that the parents concerned have not participated in gainful employment for a continuous period of three years or more. Thirdly, analogical reasoning was used whereby if a number of different things are similar to each other in a number of specific ways, they should also be similar to each other in other ways.¹⁷⁵ Are the causes of long-term unemployment that greatly contribute to the Gap not analogous to the causes of persistent poverty? The relationship between long-term unemployment and persistent poverty, and the violation of economic and social human rights, for instance, cannot be captured so easily unless similitudes in cases and principles are compared.

Fourthly, as in courts adjudicating cases of human rights violations, a ‘descriptive’ approach was also used to reach the general conclusions.¹⁷⁶ Descriptive approach involves

¹⁷¹ T Huddleston, J Niessen and JD Tjaden, *Using EU Indicators of Immigrant Integration* (Final Report for Directorate-General for Home Affairs, European Commission, Brussels 2013) 15.

¹⁷² T Liebig and L Schröder, ‘Main Findings’ in OECD, *Equal Opportunities?: The Labour Market Integration of Children of Immigrants* (OECD Publishing 2010) <www.oecd-ilibrary.org/social-issues-migration-health/equal-opportunities/main-findings_9789264086395-1-en, <http://dx.doi.org/10.1787/9789264086395-en> > accessed 28 March 2018.

¹⁷³ I McLeod, *Legal Method* (9th edn Palgrave Macmillan 2013) 13.

¹⁷⁴ *Ibid* 14.

¹⁷⁵ *Ibid*.

¹⁷⁶ C McCrudden, ‘The Pluralism of Human Rights Adjudication’ in L Liora, C McCrudden and N Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014) 3-27, 17.

‘textual methods’,¹⁷⁷ where the actual words of a written text are used to determine the application of a provision.¹⁷⁸ The ‘historical methods’ put more emphasis on the broader understanding of the textual provision and not the dictionary meaning of the words.¹⁷⁹ The meaning of the word or the phrase like the right to work is interpreted with reference to words intended by the legislators of the provision or the ‘Originalist Interpretation’.¹⁸⁰ The analysis of the *travaux préparatoires* of Universal Declaration of Human Rights, for instance, revealed the intention of the drafters of Article 23.¹⁸¹ The method was expanded to interpret relevant articles of, inter alia, the ICESCR, General Recommendation from CESCR and CERD; the Universal Periodic Reviews, the Limburg Principles, the Maastricht Guidelines, the Revised European Social Charter, EU Directives and national legal provisions.

Finally, the doctrine of precedence was also employed. A former judicial decision, a precedence, is used to support a new decision. Like cases are thus decided alike. Although many cases are adapted from other jurisdictions, their relevance to the Gap cannot just be ignored. The causes of the Gap, its effects, and the need to craft lasting remedies justifies the adoption of ‘disruptive’ and ‘unorthodox’ approaches that conform to internationally agreed upon human rights.¹⁸² Comparative law reasoning as well as adoption of the doctrine of precedence from international legal regimes may carry more legitimacy than domestic law provisions. Respect of universally agreed principles of autonomy, liberty, equality, non-discrimination, democracy, the rule of law, etc., can conquer the intractable Gap.

1.5 Thesis outline

The thesis is divided into six chapters. This first chapter introduces the subject matter, ie the Refugee Gap. It analyses the global and general elements of the Gap. Emphasis is put on the context and experience of the Nordics. The pros and cons of the different methods used to study the Gap are weighed carefully and a different approach is proposed if the Gap is to be mitigated.

¹⁷⁷ Ibid 17.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid 27.

¹⁸⁰ Ibid.

¹⁸¹ The Article covers the right to work and other rights governing employment relationships.

¹⁸² C McCrudden, ‘The Pluralism of Human Rights Adjudication’ in L Liora, C McCrudden and N Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014) 3-27, 23.

Chapter 2 provides a *résumé* of the general causes and effects of the research hypothesis. It introduces refugees as subjects of international law, with certain prescribed rights, who find themselves at the periphery of Nordic society; and places them at the centre of the discussion. Resettling refugees on a quota basis in third, distant, non-adjacent countries has been shown to be objectively justified by the international community. Minimizing the suffering refugees experience after their forceful flights from persecuting countries is identified as an international human right and humanitarian obligation on States. The chapter further draws comparisons between the Nordics and other multiple refugee resettlement countries. The period of analysis is divided into two phases: short-term and long-term. Causes are either endogenous or exogenous. The causes identified through qualitative studies and the correlations captured by quantitative studies are discussed with reference to the time dimension, where a new picture emerges. The chapter further lays the foundation on which to identify the rights which, if breached, lead to the violation of specific legal provisions. Previous literature reviews have, for example, included no overview of the interaction between the Gap and human rights.

Chapter 3 discusses some of the specific rights violated by the Gap. The violated rights and values include but are not limited to: dignity, equality, self-esteem, self-realization and non-discrimination. The right to work emerges as the most important right which, if not respected, results in the Gap. The right to work is protected by national constitutions, regional and international human rights instruments and bodies. Various legal and philosophical justifications for protecting the right to work are identified. For the purpose of comprehending the *raison d'être* of the right to work, the *travaux préparatoires* of the Universal Declaration of Human Rights are revisited. Can the historical origin of the right to work explain and strengthen its importance?

Chapter 4 identifies and deals with one cause which could be the most elusive in contributing to the Gap, namely discrimination. In the long term, it contributes to the Gap although the topic is not seriously or often debated in public.¹⁸³ The chapter is divided into two parts. The first deals with the causes and effects of discrimination in general terms, using sociological and economic perspectives, among others. The meaning of discrimination, its operating mechanisms, and international sources of anti-discrimination laws are dealt with. The

¹⁸³ OECD, *Jobs for Immigrants (Vol. 3): Labour Market Integration in Austria, Norway and Switzerland* (OECD Publishing 2012) < <http://dx.doi.org/10.1787/9789264167537-en> > accessed 6 June 2017.

second part deals with terminologies as used in discrimination law on a contextual basis. It sets out the four prohibited conducts which, if applied on a protected ground or characteristic, result in suffering a detriment. Terms like proportionality, objective justification, comparators, and differences in treatment due to genuine or determining occupation requirements, are explored. The requirement for statistical evidence and other proofs if a claim of discrimination is to be lodged, and the reversal of proof of discrimination to the respondent, are also explained in detail. Specific anti-discrimination acts and directives are revealed as sources of anti-discrimination laws. Case law from the equality bodies, the Ombudsmen (Finland, Norway and Sweden), and other court decisions from Denmark and the European Court of Human Rights are also referenced.

Chapter 5 examines the quest of finding solutions to the hitherto intractable Gap. The value of human rights and the requirement for commitment to the observance of the trichotomous duties and obligations is examined. Since a combination of factors is blamed for the persistence of the Gap, several disparate approaches are suggested. These include, among others, increasing the capacity of institutions dealing with victims of the Gap, judicial redress, direct compensation, and application of other anti-discrimination measures, etc. Lastly, Chapter 6 concludes the thesis by summarizing and re-examining the probable causes. It re-evaluates the causes of the Gap both in the short and long term. Methods used to study the Gap are also re-discussed. The failure to generate binding duties and obligations for authorities becomes the rationale for deploying human rights laws and standards. The chapter evaluates the contribution to knowledge and recommends new approaches to deal with the Gap.

1.6 Limitations

The aim of this section is to highlight the potential weaknesses in the thesis. No research projects start with a truly *tabula rasa* mind-set.¹⁸⁴ The basis is academic research but the author's personal experience as a quota programme refugee resettled in the Nordics widened the understanding of the phenomenon under investigation. The complicated process of how people become refugees qualifying for international protection is, to a large degree, not theoretical. The

¹⁸⁴ MB Miles and AM Huberman, *Qualitative Data Analysis* (2nd edn SAGE Publications 1994) 155.

long-term unemployment¹⁸⁵ that afflicts refugees even after the acquisition of Nordic-specific competencies is not only read in newspapers, journal articles, government official reports,¹⁸⁶ etc., but has been experienced by personally. This reality has helped provide the impetus to immerse into the thesis. Again, being in position to personally know more than 10 families under the Gap despite their education and experience, and combining the experience of volunteering for an organization working with rejected asylum seekers, has also provided the rare privilege of being an ‘insider’ examining the phenomenon as an ‘outsider’.

However, in order to avoid possible value judgments and personal bias, the researcher’s experience has not shaped the thesis outcomes. If material facts and perceptual issues have been misrepresented in anyway, this should not be interpreted as intentional or based on any wrongful motivation. The thesis is an academic work searching for solutions, and aiming to give a neutral and balanced picture of the Gap. The basis is lack of satisfactory answers as to what causes the Gap in the long-term, and the partial failure of the proposed solutions to mitigate the Gap, from the existing literature. The arguments contained in the thesis are based on openly and publicly available information such as legal texts, court cases, policy documents, journal and current newspaper articles, inter alia. Legal and other international human rights texts were interpreted in a way that gives them their natural meaning. Causes of the Gap were examined as probable, with an assumption that no single cause was sufficient to result in the Gap. Factors such as a

¹⁸⁵ Long-term unemployment is one of the main indicators of social exclusion. See for example, PM Kongshøj, P Munch-Madsen and K Langhoff-Roos, ‘How well do European Employment Regimes Manage Social Exclusion?’ in RJA Muffels, P Tsakoglou and DG Mayes (eds), *Social Exclusion in European Welfare States* (Edward Elgar 2002) 235, 252.

¹⁸⁶ See for example, O Stokke and S Gedde-Dahl, ‘20 år. 23 handlingsplaner. 672 tiltak. Men fortsatt er arbeidsledigheten blant innvandrere tre ganger så høy’, Aftenposten (24 November 2012) < www.aftenposten.no/norge/i/7ljn9/20-ar-23-handlingsplaner-672-tiltak-Men-fortsatt-er-arbeidsledigheten-blant-innvandrere-tre-ganger-sa-hoy > accessed 22 January 2018; O Stokke, ‘Halvparten av kvinnene fra Etiopia jobber. Fire av fem fra Somalia gjør det ikke’, Aftenposten (6 February 2014) (Half of the women from Ethiopia work. Four out of five from Somalia do not) < www.aftenposten.no/norge/i/x5aQ/Halvparten-av-kvinnene-fra-Etiopia-jobber-Fire-av-fem-fra-Somalia-gjor-det-ikke > accessed 22 January 2018; A Slettholm, ‘4 av 5 somaliske innvandrerkvinner er uten jobb - SSB mener integreringen «går rimelig bra»’, Aftenposten (9 May 2016), (4 out of 5 Somali immigrant women have no jobs – Statistics Norway says integration is going reasonably well); *NOU 2011:14 Bedre Integrering – Mål, Strategier, Tiltak* (Barne-og likestillingsdepartementet 2011) (Official Norwegian Report 2011:14 Better Integration – Goals, Strategies, Measures, Ministry of Children and Equality 2011); L Bore, AB Djuve og KR Tronstad, ‘Etnisk mangfold og likestilling i arbeidslivet: En kunnskapsstatus’, Fafo-rapport 2013:11 (‘Nettutgave’ 2013) (‘Ethnic diversity and equality in the working life: a knowledge Status’, Online edition 2013) < www.fafo.no/images/pub/2013/20301.pdf > accessed 22 January 2018; AB Djuve og AS Grødem (red.), ‘Innvandring og arbeidsmarkedsintegrering i Norden’ (Immigration and labour market integration in the Nordics), Fafo report 2014:27, Oslo 2014).

lack of local language proficiency, recession, age, discrimination, etc., were not sufficient causes, nor was the laissez-faire labour market the sole determinant. The ability of some refugees to manoeuvre and get jobs calls for caution in analysis of the causes.

Comparing the Gap in the Nordics, namely, Denmark, Finland, Norway and Sweden, is challenging even though all the four countries have had resettled refugees for over three decades.¹⁸⁷ For example, Sweden started to resettle refugees during World War II and later, more refugees came from Hungary in 1956, Greece in 1957, Czechoslovakia, Chile, Turkey, Lebanon, Turkey, Vietnam, Poland, Iran, the Balkans, Ethiopia, Somalia, etc.¹⁸⁸ Finland has also resettled refugees since 1922, where about 20,000 Russians benefited.¹⁸⁹ Finland resettled more refugees from Chile in 1973-1978 and a more organized refugee policy which saw the resettlement of Vietnamese refugees was already in place in 1979.¹⁹⁰

Most research on the subject, however, compares Denmark, Norway and Sweden.¹⁹¹ Finland rarely appears in the comparative studies of refugee integration, yet it resettles more quota refugees than Denmark.¹⁹² However, common to all the Nordics is the introductory programme for newly arrived refugees. Teaching refugees the local language is a common feature of the programme. However, the way it is vertically and horizontally organized, its

¹⁸⁷ Denmark has resettled refugees since 1979 < www.unhcr.org/3c5e57b07.html >; Norway since 1945 < www.unhcr.org/3c5e59835.html >; Sweden since 1950, its annual quota was 1,900 < www.unhcr.org/3c5e5a219.html >; Finland since 1979 where the annual quota from 1985 was 750 until 2013 when 300 places were added < www.unhcr.org/3c5e57f07.html > accessed 22 August 2017.

¹⁸⁸ O Åslund, A Forslund and L Liljeberg, 'Labour market entry of non-labour migrants – Swedish evidence' in B Bratsberg et al., *Nordic Economic Review: Labour Market Integration in the Nordic Countries* (TemaNord 2017:520, Nordic Council of Ministers 2017) 115- 158, 117.

¹⁸⁹ M Sarvimäki, 'Labour Market Integration of Refugee in Finland' in B Bratsberg et al., *Nordic Economic Review: Labour Market Integration in the Nordic Countries* (TemaNord 2017:520, Nordic Council of Ministers 2017) 91- 114, 93.

¹⁹⁰ M Sarvimäki *ibid* 94.

¹⁹¹ See, for example, V Hernes og KR Tronstad, 'Komparativ analyse av introduksjonsprogram I Norge, Sverige og Danmark' (NIBR-Rapport 2014:19, 2014) ('Comparative Analysis of Introduction Programme in Norway, Sweden and Denmark', NIBR Report 2014:19, 2014); P Bevelander et al., *Scandinavia's Population Groups Originating from Developing Countries: Change and Integration* (Nordic Council of Ministers 2013); SV Pettersen and L Østby 'Skandinavisk Komparativ Statistikk om Integrering: Innvandrere i Norge, Sverige og Danmark' (TemaNord 2013:561, SSB 2013) ('Scandinavian Comparative Statistics about Integration: Immigrants in Norway, Sweden and Denmark', Statistics Norway 2013); OECD, *Working Together: Skills and Labour Market Integration of Immigrants and their Children in Sweden* (OECD Publishing, Paris 2016) Chapter 2.

¹⁹² Finland's Quota was 750 and that of Denmark was 1500 in three years.

components, and the legal ramifications differ substantially.¹⁹³ Could Finland's integration policies differ in content and ramifications? Are they better or worse? Is it because of the linguistically more challenging Finnish language? Generally, Danish, Norwegian and Swedish languages are, to a large extent, mutually intelligible.

1.6.1 Referencing and translation

Citations in footnotes use the Oxford University Standard for the Citation of Legal Authorities (OSCOLA).¹⁹⁴ However, because the main source of primary and secondary information was Nordic literature and case law, there was a practical need to change the original referencing styles. Information had to be translated from Norwegian, Danish and Swedish into English. Because of the limited financial resources, a professional translator could not be engaged. All translations are therefore unofficial but the original meanings have been maintained as far as possible.

1.7 Conclusion

The chapter is a 'summary' of the rest of the thesis. The research question as well as the background information about the research hypothesis, the aims and objectives of the thesis, have been elucidated. Short-term/long-term are hypothetical periods which can be used to assess factors that lead to the success or failure of refugee's integration policies. The background information has revealed the mixed motives to resettled refugees: humanitarianism can become symbiotic if the process is justly and fairly managed. The massive movement of the refugees can dampen the demographic as well as the fiscal challenges if refugees and their offspring are employed. No country prioritizes the most unemployable refugees i.e. the sick and the old (those over 40). In Norway, the most determining factor to resettle refugees on a quota basis are age and gender: being under the age of 18 or most 'vulnerable' woman/girl, may provide strong impetus than persecution per se, though the latter forms the foundation of the claim. If

¹⁹³ V Hernes and KR Tronstad '*Komparativ analyse av introduksjonsprogram i Norge, Sverige og Danmark*' (NIBR-Rapport 2014:19).

¹⁹⁴ Fourth Edition (2012) and Citing International Law Sources Section (2006).

integration of the newcomers is not grounded in respect for human rights, formidable challenges in form of the Gap are inescapable.

Because of the nature of refugees and the context of the research question, difficulties in terminology could cause some difficulties. Generally, statistics and other data on resettlement/quota programme refugees are blurred. It does not differentiate them from other categories of refugees like those who arrived as asylum-seekers, family reunification members, and those who arrive on family visas. To nationals and the authorities in general, resettlement refugees are the same as ordinary migrants or other refugees. After completing the language courses but without work, they join the same statistical group as unemployed nationals, even though they are not in a comparable situation.

Methodologically, by appealing to international human rights standards, this thesis has pushed into novel methods of inquiry. Subjecting the causes, effects, and solutions of the Gap to new modes of inquiries that human rights principles and norms can be contested. In suggesting compensating refugees for the lost earnings, the thesis could be seen to be pushing into an area where fools rush in but angels fear to tread. Matters that have national budgetary implications, even when justiciable, are frequently avoided, even by courts.¹⁹⁵ There is however an empirical void in addressing the issue of compensating victims of human rights violations. The resistance and negative reaction from the public may not be there or, in the worst case scenario, may be ephemeral. There is always a section of nationals who wish the Gap to disappear, and who will go for compensation (universal or basic wage) since it is one of the untried solutions. Why not give them chance?

¹⁹⁵ G Silverstein, 'Law's Allure: How Law Shapes, Constrains, Saves and Kills Politics' (CUP 2009) in P O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2012) 197.

Chapter 2. Causes and Repercussions of the Gap

2.1 Introduction

The chapter introduces the thesis hypothesis, the Refugee Gap or simply the Gap. Its aim is to critically analyze and thereafter succinctly present the nature, scope and the ramifications of the Gap. The Gap is multi-dimensional and therefore requires a multi-disciplinary approach. The Gap has been studied in historical as well as in contemporary policy dimensions; from global to local perspectives. Sociologists, in particular, have studied the Gap in detail using qualitative and quantitative approaches. Comparisons are drawn between countries which resettle significant number of refugees on quota basis. Quantitative methods too have revealed statistically significant or positive correlations between the variables used. However, sociological studies produce sociological solutions which hitherto have miserably failed to mitigate or dislodge the Gap in the Nordics. Because the major aim of the thesis is to find factors which can mitigate the Gap, a new and disparate approach has therefore been chosen. International human rights, regional as well national legal provisions have been invoked. Will possible solutions come from the new approach? This chapter therefore lays down the foundation for the position from which the Gap can be approached using the established international human rights law and norms. In that regard, some initial questions need to be answered:

- Do states that resettle refugees provide and fulfil their internationally recognized human rights obligations by enabling refugees to enjoy their rights, such as the right to work, protection against discrimination, equal access to employment opportunities, etc.?
- Do state authorities effectively monitor the progress or regression of the policies and programmes designed to ameliorate the Gap?
- Could there be acts of omission and/or commission that tantamount to violation of international human rights?
- Who is accountable for such acts of omission and commission?
- If acts of omission and commission are confirmed, how shall international human rights law react so that the refugees escape the Gap?

In order to address these questions, it is right and appropriate to start by presenting the general definition of the Gap.

2.2 Defining the Gap

Generally, the Gap has no single or clearly demarcated definition. However, the reality does not mean that it cannot be studied with some degree of certainty. The Gap partially refers to the endemic disparity between the amount of money and other accruals refugees are paid if they are actively employed, and the equivalent amounts received by others. Here, a refugee means someone who has run away from persecution and has been given formal protection by another country; or a person recognized as a refugee under the criteria set out in Article 1(A) 2 of the Refugee Convention.¹⁹⁶ Compared to employees without a refugee background, refugees are characteristically paid beggarly wages, especially in countries like the United States of America.¹⁹⁷ The Gap also refers to the lack of access to employment opportunities and occupational attainment, ie the lack of promotion within employment; and to an overall lack of access to gainful employment, resulting in long-term unemployment, at least in the context of the Nordic countries. In Finland, for example, employment roughly refers to ‘holding a job at the end of the year or having any wage, salary or entrepreneurial income.’¹⁹⁸

2.3 Qualitative studies

2.3.1 The Gap is ‘global-local’, multifaceted and intractable

The Gap has been found to exist between resettlement refugees and nationals of the countries in which they have settled. It also exists in the cases of refugees who obtain refugee status by claiming direct asylum, family reunion members and economic migrants. The Gap exists in the short-term as well as the long-term, and is found in all refugee resettling countries.¹⁹⁹ Immediately after resettlement, ie in the short term, the Gap is similar in almost all

¹⁹⁶ UNGA, *Convention Relating to the Status of Refugees* (adopted 28 July 1951 entered into force 22 April 1954 United Nations Treaty Series Volume 189, 137) (Refugee Convention); UNGA Res 2198 (XXI) (16 December 1966) (Refugee Protocol).

¹⁹⁷ P Connor, ‘*Vindicating Socio-Economic Rights: International Standards and Comparative Experiences*’ (Routledge 2012)382.

¹⁹⁸ M Sarvimäki, ‘Labour Market Integration of Refugee in Finland’ in B Bratsberg et al., *Nordic Economic Review: Labour Market Integration in the Nordic Countries* (TemaNord 2017:520, Nordic Council of Ministers 2017) 91-114, 101.

¹⁹⁹ Short-term should be roughly six months to three years in the case of the United States of America, United Kingdom, Canada, and Australia; and five to seven years for the Nordics

countries that participate in the refugee quota programme.²⁰⁰ However, differences do emerge in the long-term. This could be due to, *inter alia*, a natural result of each country's policies towards refugees and the structure of society. Literature on the Gap reveals that it is not only multi-faceted but is also intractable. There is no single or easy solution to mitigate its effects. The Gap cannot be captured or explained by a single theory or a once-and-for-all research project or thesis. A multi-dimensional approach is therefore proposed to establish how the Gap can be explained and how it affects refugees and their dependents.

The generation of employment statistics on refugees is difficult to achieve with certainty.²⁰¹ However, much as it is difficult to deal with small, disaggregated and sometimes non-representative statistical samples, this has not prevented researchers from confronting the Gap. This is because all the small but different samples that may appear on the surface to be non-representative, enable the Gap to be studied with some level of confidence when taken together. One such approach has been to disaggregate studies by, for example, gender, ethnicity or country of origin. For example, data for Bosnians resettled in the United States of America between 1993 and 1999 revealed that there were no opportunities for short-term advancement.²⁰² In other studies, however, the Gap is prevalent but not universal, as highlighted by Ott's literature review.²⁰³ In the United States of America, for example, the rate of employment of refugees was on a par with the native population, although wages were lower.²⁰⁴

It is postulated that studies of the Gap fail to control for any of the obvious determinants of labour market integration.²⁰⁵ For example, specific refugees' vulnerabilities and experiences

²⁰⁰ P Bevelander and C Lundh, *Employment Integration of Refugees: the Influence of Local Factors on Refugee Job Opportunities in Sweden* (Discussion Paper Number 2551, Institute for the Study of Labour 2007); P Lundborg, 'Refugees' Employment Integration in Sweden: Cultural Distance and Labor Market Performance' (2013) 21 (2) *Review of International Economics* 219; G Hugo, 'The Economic Contribution of Humanitarian Settlers in Australia' (2013) 52 (2) *International Migration* 31 in E Ott, PDES/2013/16, 41.

²⁰¹ E Ott, PDES/2013/16.

²⁰² B Franz, 'Bosnian Refugee Women in (re) settlement: Gender Relations and Social Mobility' (2003) 73 (1) *Feminist Review* 86 in E Ott, PDES/2013/16, 15.

²⁰³ E Ott, PDES/2013/16, 12.

²⁰⁴ P Connor, 'Explaining the Refugee Gap: Economic Outcomes of Refugees versus Other Immigrants' (2010) 23 (3) *Journal of Refugee Studies* 377; KE Cortes 'Are Refugees Different from Economic Immigrants? Some Empirical Evidence on the Heterogeneity of Immigrant Groups in the United States' (2004) 86 (2) *The Review of Economics and Statistics* 465.

²⁰⁵ E Ott, PDES/2013/16, 12.

that may explain their initial poor market integration are sometimes ignored by various studies. This could be due to the fact that the assessment for resettlement is based on heightened risks: the reasons for resettlement could include legal issues, physical protection risks and serious medical issues. The vulnerability of some groups, for example, women and at-risk girls, or refugees in protracted situations, that is, whose lives are on a downward trajectory, can also be hypothesized as a factor.

On the other hand, there could be a mismatch of skills: the demands of the labour market may be different from what refugees can offer, especially in the short-term. But even after controlling for the differences, refugees still exhibit poorer outcomes on the labour market. The obvious assumptions for this impediment are that refugees do not enter any country on the basis of that country's labour market needs. Refugees, in addition, have no strong social networks that can be used in searching for jobs. Other hindrances may include poor language skills, lack of or poor education and training; trauma and poor mental well-being. Finally, discrimination could be one of the biggest stumbling blocks among all the hypothesized reasons.

2.3.2 Discrimination revealed by qualitative and quantitative approaches

Discrimination is dealt with in details in chapter four of this thesis. However, it is worthy to briefly show what qualitative and quantitative researchers have observed. For example, 'the existence of attitudinal and institutional factors of resistance along the boundaries of the employment market' puts immigrants in 'a very marginal position in the labour market' despite their best efforts, for example.²⁰⁶ In Norway, it was concluded that ethnic discrimination was a problem.²⁰⁷ For example, the chance of a candidate with a Pakistani name being called for a job interview was less than 36 per cent in a private company, and 25 per cent in the public sector.²⁰⁸ For a candidate with a Norwegian name, the chance was greater than 16 per cent in the public sector. It was also noted that 'despite the fact that both men have grown up in Norway and have

²⁰⁶ K Valtonen, 'Social Work with Immigrants and Refugees: Developing a Participation-Based Framework for Anti-Oppressive Practice' (2001) 31 (6) *British Journal of Social Work* 955 in E Ott, PDES/2013/16, 12; G Hugo, The economic contribution of humanitarian settlers in Australia (2013) 52 (2) *International Migration* 31.

²⁰⁷ AH Midtbøen, 'Rom for Diskriminering', Aftenposten (17 December 2013) ('Space for Discrimination') < www.aftenposten.no/viten/Rom-for-diskriminering-7408339.html#.UrB4YeKX_qs > accessed 17 December 2013.

²⁰⁸ Ibid. See also GE Birkelund, K Heggebø and J Rogstad, 'Additive or Multiplicative Disadvantage? The Scarring Effects of Unemployment for Ethnic Minorities' (2017) 33 (1) *European Sociological Review* 17-29.

the same education and work experience, Norwegian employers choose Knut more often than Muhammed'.²⁰⁹ Candidates with Norwegian names were most sought after, and that discrimination because of religion was moderate.²¹⁰ People of African descent, including their sons and daughters, were the least desired, even after 10 years' stay.²¹¹ Swedes, on the other hand, were the most desirable group.²¹²

In another study, only 11.5 per cent of ethnic Norwegians had experienced unemployment after duly completing their studies against 25.3 per cent of the 'non-Europeans' who had had their high education in Norway.²¹³ The decisive factor in getting a job, accordingly, is ethnicity, not higher education or perfect Norwegian skills: non-European immigrants experience prejudice and discrimination by employers regardless of their education and skills.²¹⁴ In the Nordic Economic Review 2017 forward, Piil and Åslund noted that 'to make quicker and better use of the skills of highly educated migrants is one type of challenge...'.²¹⁵ 'Good performance in the educational system is a prerequisite for successful labour market integration [in Norway], yet success in education alone will probably not be seen as enough for successful integration'.²¹⁶

And, in another survey, every fifth adult Norwegian believed their colleagues at work had got the job because of their looks rather than their qualifications.²¹⁷ The survey continued that

²⁰⁹ GE Birkelund, *Hiring Knut ahead of Muhammed*, University of Oslo (21 March 2016) < www.sv.uio.no/iss/english/research/news-and-events/news/2016/foretrekker-knut-framfor-muhammed-.html > accessed 29 March 2016.

²¹⁰ Ibid.

²¹¹ Ibid.

²¹² Ibid.

²¹³ P Vollset and J Svarstad, *Fordommer: Hjelper ikke å kunne norsk*, Universitas (20 April 2004) (Prejudices: Knowledge of Norwegian Language Does not Help) > <http://universitas.no/nyhet/4415/hjelper-ikke-a-kunne-norsk/hl:innvandrere> > accessed 6 September 2014.

²¹⁴ Ibid.

²¹⁵ A Piil and O Åslund, 'Foreward' in B Bratsberg et al., *Nordic Economic Policy Review: Labour Market Integration in the Nordic Countries* (TemaNord 2017:520, Nordic Council of Ministers 2017) 13.

²¹⁶ P Bevelander et al, *Scandinavia's Population Groups Originating from Developing Countries: Change and Integration* (NordTema 2013:561 Nordic Council of Ministers 2013) 150.

²¹⁷ B Haugen, 'Undersøkelse: Hver femte nordmann tror at kollegaer har fått jobben på grunn av utseende', VG (30 October 2014)(Every Fifth Norwegian believes that colleagues have secured the job because of outside appearance) < www.vg.no/nyheter/innenriks/jobben-din/undersokelse-hver-femte-nordmann-tror-at-kollegaer-har-faatt-jobben-paa-grunn-av-utseende/a/23324899/ > accessed 30 October 2014.

this is a ‘halo effect’ belief: if you have good looks, it can contribute to the belief that you are smart and clever or intelligent, thereby reinforcing the positive effects of looking good. In another example, an 18-year-old candidate by the names of Mahad Abdi Jama applied for part-time work in a supermarket, was rejected three times, but when he applied under the names of Mats Pettersen, he was called for an interview the next day.²¹⁸ He had to use a Norwegian name before he could be called for a job interview. Discrimination has also been observed in football: of the 186 most senior governing members of the Football Association of Norway, ‘*Norges Fotballforbund*’ (NFF), no one had an ethnic minority background even though the national team was multi-cultural.²¹⁹ It was concluded that the NFF scored badly on the integration of minorities.

Seen differently, most of the above examples concern people from ethnic minority background, refugees being the quintessential. Again, the sources of evidence are online newspaper articles whose authenticity, validity, neutrality and impartiality can be hotly contested, especially in academia. However, lack of primary source material does not mean the non-existence of the subject matter. Discrimination is often a sensitive subject. Most information about it is strictly guarded due to personal protection. At the same time, a story in newspapers may appear as isolated but it can be a tip of an iceberg, representative of substantial or other unreported examples. The conclusion is that the same experience of discrimination can extend to people with non-European sounding names, and in particular to refugees, because most of them originate from the Middle East, part of Asia, Africa and South America. When reality of being a refugee is combined with visible symbols of religion, ethnicity, phenotype, morphology and country of birth or origin, for instance, the risk of suffering a detriment because of discrimination can be real. But research has gone further by comparing the Gap with and within other vulnerable groups, particularly economic migrants.

²¹⁸ AS Qvenlid and J Nilas, ‘*Mahad fikk NEI, «Mats» fikk JA*’: *Måtte bruke norsk navn for å komme på jobbintervju*, VG (5 May 2009) (Mahad got no, Mats go yes: had to use a Norwegian name to come for a job interview) < www.vg.no/nyheter/innenriks/mahad-fikk-nei-mats-fikk-ja/a/562642/ > accessed 30 October 2014.

²¹⁹ A Øyvind *et al.* ‘*NFF: Klubbene er for Dårlige på Integrering*’, VG Nett (25 March 2014) (Football Association of Norway, NFF: the clubs are too poor at integration) < www.vg.no/sport/fotball/fargeloest-fellesskap/nff-klubbene-er-for-daarlige-paa-integrering/a/10129884/ > accessed 25 March 2014.

2.3.3 Resettlement refugees versus other immigrants

Disaggregating the Gap's variables can be extended to other immigrants whose original motive to migrate are different. Although most immigrants find themselves in precarious employment,²²⁰ many studies have concluded that their labour market integration is better than that of resettlement refugees. In Norway, one study that focused primarily on people from Vietnam, Iraq and Iran, concluded that compared with other immigrants, the outcome of refugees was poorer.²²¹ Immigrants 'who have arrived as refugees tend to have the lowest employment rates, while labour migrants, unsurprisingly, have the highest'.²²² In Denmark, employment rates for male immigrants aged 24-54 for the years 1998 to 2008 were lowest among Somalis at about 35 percent.²²³ This was followed by Iraqis at 45 per cent and Pakistanis at around 50 per cent.²²⁴ For all men (including native Danes) the employment rates were consistently over 80 percent for the 10 year period.²²⁵ In the same study, the largest gap existed between the reference group (all women) and women from Somalia at 55 per cent.

In Sweden, it was found that resettled refugees' employment rates and self-employment rates were lower when compared to asylum claimants and family reunion immigrants.²²⁶ Literature from other countries has also revealed that the Gap is more prevalent among people with a refugee background. In Australia and the USA, for example, 'Refugee-humanitarian migrants have lower labour market participation and higher unemployment levels than other migrants'.²²⁷ In the United States of America, the existence of the 'refugee gap' was revealed after determinants for disadvantages were controlled: the results again showed that refugees and those fleeing humanitarian situations had poorer outcomes than other migrant and non-migrant

²²⁰ S Castles and MJ Miller, *The Age of Migration: International Population Movements in the Modern World* (4th edn Palgrave MacMillan 2009) 310.

²²¹ V Aalandslid, 'Overføringsflyktningers Integrering i det Norske Samfunn' in E Ott, PDES/2013/16, 40.

²²² G Brochmann and AS Grødem, 'Migration and Welfare Sustainability: The Case of Norway' in E Jurado and G Brochmann (eds), *Europe's Immigration Challenge: Reconciling Work, Welfare, and Mobility* (IB Tauris 2013) 59-76, 65.

²²³ P Bevelander et al., *Scandinavia's Population Groups Originating from Developing Countries: Change and Integration* (TemaNord 2013:561 Nordic Council of Ministers 2013) 211.

²²⁴ Ibid

²²⁵ Ibid

²²⁶ P Bevelander, 'The Employment Integration of Resettled Refugees, Asylum Claimants, and Family Reunion Migrants in Sweden' (2011) 30 (1) *Refugee Survey Quarterly* 22.

²²⁷ E Ott, PDES/2013/16, 40.

groups.²²⁸ Other studies in the USA showed that refugees had the same likelihood of employment as other immigrants, but significantly lower occupation status and earnings.²²⁹

On the other hand, in Vancouver, Canada, the situation was not clear-cut. Although refugees had lower labour force participation and higher welfare usage, they nonetheless exhibited resilience in the labour market (for example in earnings), with only some gaps.²³⁰ Furthermore, in Sweden, refugees from the Balkans entered the labour force.²³¹ The category included those with higher education and those who arrived at a younger age. Another study in Norway revealed that Bosnians were the most integrated refugees and had the highest median income, second only to native Norwegians, among the 10 biggest migrant groups.²³² In one comparison, the employment difference between refugees from Bosnia and Somalia was 22.2 percentage points for men and 37.7 points for women.²³³

In France, one report disagreed that resettlement refugees integrate poorly: it found that employment and other integration indicators converged in the long term; and that studies focusing on the short term, certain locations, certain points in time and recent data may fail to be representative.²³⁴ In the long-term, it is expected that refugees will overcome most of the major issues like the lack of language skills and social networks, as most re-educate and re-skill themselves once resettled.

In the short-term, uncertainties can arise to conclude whether the causes are predominantly endogenous or exogenous. A study of people from the Rohingya community and refugees from the Democratic Republic of Congo, for instance, found that they generally concentrated on language classes and adapting to their new lives 18 months after their

²²⁸ P Connor 2010; E Ott, PDES/2013/16, 40; E Ott, PDES/2013/16, 40.

²²⁹ Ibid.

²³⁰ E Ott, PDES/2013/16 para 31 (i).

²³¹ A Törnkvist, 'Education Key to Balkan Refugee Integration', *The Local* (18 February 2013) < www.thelocal.se/jobs/article/46260 > accessed 17 October 2017.

²³² M Valenta and SP Ramet (eds), *The Bosnian Diaspora: Integration in Transnational Communities* (Ashgate 2011).

²³³ B Bratsberg, O Raaum and K Røed, 'Immigrant Labor Market Integration across Admission Classes' in B Bratsberg et al., *Nordic Economic Policy Review: Labor Market Integration in the Nordic Countries* (TemaNord 2017:520, Nordic Council of Ministers 2017) 41.

²³⁴ E Ott, PDES/2013/16, 13.

resettlement in the UK.²³⁵ In the Nordics, namely Denmark, Finland, Norway and Sweden, refugees take a minimum of two years to learn the local language. In Norway, for instance, learning the local language is compulsory, and many benefits are attached on it. The successful completion of the language course is the basis for obtaining permanent residency permit and eventual citizenship or nationality. The thesis therefore suggested five years as the most reasonable time to start to study the Gap. However, despite all the adjustments on the side of refugees, the Gap does persist, sometimes permanently. Overall, the studies concluded that refugees' labour market participation and therefore earnings are generally poorer than those of other immigrant groups although the results are not wholly conclusive in the short-term.

2.3.4 Refugees versus native population and time dimension

Other studies have compared refugees' labour market participation and earnings to those of the native population. Lundborg's research in Sweden revealed that the employment rate for refugees lagged behind that of the native population, essentially for the duration of their entire time in Sweden: the rate varied by country of origin, and by the age of refugees at the time of their arrival.²³⁶ Arriving after an immigrant has turned 30 is likely to result into lower employment rates, but the 'largest "penalty" appears for male refugees arriving in their forties'.²³⁷ Compared with immigrants from both the Old and the New EU countries, 'there is less age immigration heterogeneity in employment' in Norway.²³⁸

Another study revealed: 'Like in many other Western European countries, most immigrant groups in Sweden have lower employment levels than natives'.²³⁹ Statistics Sweden

²³⁵ D Platts-Fowler and D Robinson, *An Evaluation of the Gateway Protection Programme* (A Report Commissioned by the Home Office 2011) in E Ott, PDES/2013/16, 13.

²³⁶ P Lundberg, 'Refugees' Employment Integration in Sweden: Cultural Distance and Labour Market Performance' (2013) 2 (2) *Review of International Economics* 219.

²³⁷ B Bratsberg, O Raaum and K Røed, 'Immigrant Labor Market Integration across Admission Classes' (Discussion Paper Number 10513 IZA January 2017) 22; B Bratsberg, O Raaum and K Røed, 'Immigrant Labor Market Integration across Admission Classes' in B Bratsberg et al., *Nordic Economic Policy Review: Labor Market Integration in the Nordic Countries* (TemaNord 2017:520, Nordic Council of Ministers 2017) 39.

²³⁸ B Bratsberg, O Raaum and K Røed, 'Immigrant Labor Market Integration across Admission Classes' in B Bratsberg et al., *Nordic Economic Policy Review: Labor Market Integration in the Nordic Countries* (TemaNord 2017:520, Nordic Council of Ministers 2017) 39.

²³⁹ P Bevelander and C Lundh, 'Employment Integration of Refugees: The influence of Local Factors on Refugee Job Opportunities in Sweden' (Discussion Paper Number 2551 IZA January 2007); E Ott, PDES/2013/16, 41.

studied foreign-born women and men (refugees or family-member immigrants from countries outside the Nordic countries and the European Union), aged 20-49, who moved to Sweden between 1997 and 1999 and had been registered in Sweden for 13 consecutive years.²⁴⁰ The conclusion was that the frequency of gainful employment increased with the amount of time spent in Sweden. But after 13 years, foreign-born persons still had a lower frequency of gainful employment than Swedish-born persons (about 60 per cent compared to almost 90 per cent respectively).

In Norway, employment rates varies with period of residence. Rate increases between 10 to 15 years, and then recede.²⁴¹ A study of labour migrants who arrived before 1975 and whose employment once exceeded those of the reference group, only about 30 per cent were still in employment in 2007, the last year of their observation.²⁴² Similar studies which were extended to refugees and family migrants produced mixed results due to for example, short periods of observation but, ‘many groups seem to follow a similar pattern: employment rates increase rapidly in the first 10 to 15 years, then level off and sometimes fall’.²⁴³ Non-European immigrants exit the Norwegian labour force/market earlier and yet their employment rates are relatively lower.²⁴⁴

In Sweden, not all groups follow the experience above but migrants from Chile, Vietnam and Poland, tended to have a steady negative trend from a high level of employment ie they left the labour force at comparatively young ages.²⁴⁵ In one study in Australia, refugee-humanitarian settlers had lower labour force participation rates than Australian-born people, but the rates

²⁴⁰ Statistiska centralbyrån, ‘Integration: Etablering på Arbetsmarknaden’ (Integration: Rapport 7, Örebro, December 2014); Statistics Sweden, ‘Integration - Establishment on the Labour Market: Two Out of Three Refugees Are at Work After Ten Years’ (Statistical news from Statistics Sweden, No. 2014:566, December 2014); < www.scb.se/Statistik/_Publikationer/LE0105_2014A01_BR_BE57BR1401.pdf > accessed 2 October 2017.

²⁴¹ G Brochmann and AS Grødem, Migration and Welfare Sustainability: the Case of Norway’ in E Jurado and G Brochmann (eds), *Europe’s Immigration Challenge: Reconciling Work, Welfare and Mobility* (IB Tauris 2013) 59-76, 65.

²⁴² G Brochmann and AS Grødem, *ibid* 66.

²⁴³ *Ibid*.

²⁴⁴ G Brochmann and AS Grødem *ibid* 71.

²⁴⁵ O Åslund, A Forslund and L Liljeberg, ‘Labour market entry of non-labour migrants – Swedish evidence’ in B Bratsberg et al., *Nordic Economic Review: Labour Market Integration in the Nordic Countries* (TemaNord 2017:520, Nordic Council of Ministers 2017) 115- 158, 139.

converged over time and the ‘second generation performed at a higher level’.²⁴⁶ And a study in Canada of 400,000 refugees over 25 years, primarily Hungarians, Czechoslovaks, Ugandan Asians, Chileans and Indo-Chinese, concluded that refugees’ and immigrants’ labour market participation and income was poorer than that of natives.²⁴⁷

The above studies, in a nutshell, converged on one common observation: that the economic performance of native-born citizens is better than that of resettled refugees. Combining all the above studies, the labour market participation of resettled refugees is palpably the lowest, even when compared to refugees who get refugee recognition after directly applying for asylum in their respective countries of choice. It has been hypothesized that asylum seekers who travel to destinations as far from their countries of origin as Norway must be a resourceful group.²⁴⁸ The study also noted the likelihood that no old, sick or poor person could embark on such a long and arduous journey. It also observed that, because asylum seekers spend time in reception centres before their cases are processed for final settlement, they have an opportunity to learn as much as possible about their new environment, which assists them with getting jobs afterwards. In general, economic migrants performed slightly better than resettlement refugees. Lastly, the labour market participation of persons without refugee or immigration background (natives) outperformed that of immigrants and refugees. One cause (variable) which has been studied in details is time spent in the country of resettlement.

The Gap is complex and involves many variables that more often than not diametrically oppose and eliminate each other. However, past research does indicate some causes that can work in combination with other factors to complicate the Gap. One study in Norway, for example, revealed that adaptation and length of residence correlated with better outcomes and that this was true for all refugee groups.²⁴⁹ In Sweden too, the time spent in the country

²⁴⁶ E Ott, PDES/2013/16, 41.

²⁴⁷ Ibid 41.

²⁴⁸ K Henriksen, ‘*Overføringsflyktninger i Norge: Hvordan går det med FN-flyktningene i Norge?*’ (Statistiks sentralbyrå, Rapporter 7/12, 2012) (Statistics Norway, Resettlement Refugees in Norway: How is it going on with the United Nations Refugees in Norway?) < www.ssb.no/befolkning/artikler-og-publikasjoner/hvordan-gaar-det-med-fn-flyktningene-i-norge > accessed 12 September 2017.

²⁴⁹ E Ott, PDES/2013/16, 40.

drastically reduced unemployment levels for refugees.²⁵⁰ This makes the length of stay (time dimension) in the country of resettlement a factor to be considered.

2.3.5 Original motive, network, selection process and support

It is postulated that resettled refugees' original motive to migrate is protection or escape from predicament (persecution, unprovoked violence and political turmoil), and not to seek employment. Refugees, in addition, usually have no social network. This can significantly affect their labour market outcomes, especially in the short-term. In Sweden, for instance, the selection processes for immigration (self-selection or UNHCR-selection) and pre-existing networks played an important role.²⁵¹ In Vancouver, Canada, the help of settlement services was vital.²⁵²

Settling in places with high unemployment²⁵³ and other obstacles including language, education, structural disadvantage and discrimination, were all hypothesized as additional reasons for poor labour outcomes.²⁵⁴ The study went on to conclude that there was evidence that part of the Gap could be explained by discrimination.²⁵⁵ Another study in Sweden showed that certain populations had worse initial conditions due to more discrimination against people from certain cultural and ethnic backgrounds.²⁵⁶ Labour market conditions, local language proficiency, levels of sympathy among the receiving population, support from co-ethnic people and individual adaptability were also factors that influenced labour market outcomes.²⁵⁷ Comparing the seven biggest refugee groups in Norway, i.e., men and women from Afghanistan, Bosnia,

²⁵⁰ E Ott, PDES/2013/16 para 55.

²⁵¹ E Ott, PDES/2013/16, 40.

²⁵² Ibid 40.

²⁵³ E Ott, PDES/2013/16.

²⁵⁴ Ibid.

²⁵⁵ See section 2.3.2 on discrimination.

²⁵⁶ P Lundborg 2013 in E Ott, PDES/2013/16, 41; GE Birkelund, *Hiring Knut ahead of Muhammed* (University of Oslo 21 March 2016).

²⁵⁷ E Ott, PDES2013/16.

Eritrea, Iran, Iraq, Kosovo and Somalia, the performance of Bosnians in the Norwegian labour market is far much better than the rest of the group.²⁵⁸

One of the reasons why Bosnians in Norway succeeded economically, for example, was attributed to ‘generous government assistance’ in addition to ‘low prejudiced societal reception’.²⁵⁹ Policies towards newcomers (refugees) can be hostile, indifferent or supportive.²⁶⁰ When supportive, the Gap can be overcome with relative ease.

2.3.6 Jumping over double-hurdles into separate labour markets

For a refugee to enter the labour market and earn sufficient income is very difficult, especially in the short-term. Refugees tend to be hired by only a few employers, and predominantly in certain occupations or neighbourhoods.²⁶¹ In Australia, for example, people from the former Yugoslav states, black Africans and people from the Middle East were concentrated in employment areas such as cleaning, social care, meat processing,²⁶² taxi driving, security and construction. In the USA too, most of the resettled Somali Bantu as well as Burmese refugees were concentrated in meat processing.²⁶³ This trend is true for refugee populations in many countries including Norway and the Nordics in general.²⁶⁴ It can also be observed in different refugee populations, from South East Asians to Somalis, and across different demographics like age and gender, marital status, having children, household size, country of origin and ethnic group, time in country, etc.²⁶⁵ According to the United Kingdom’s Gateway Protection Programme, for example, refugees reported strong desires to work but few entered the

²⁵⁸ B Bratsberg, O Raaum and K Røed, *Immigrant Labor Market Integration across Admission Classes* (Institute of Labor Economics, IZA Discussion Paper 10513, January 2017).

²⁵⁹ M Valenta and SP Ramet (eds), *The Bosnian Diaspora: Integration in Transnational Communities* (Ashgate 2011) 83, 90.

²⁶⁰ M Valenta and SP Ramet *ibid.*

²⁶¹ E Ott, PDES/2013/16.

²⁶² V Colic-Peisker and F Tilbury, ‘Employment Niches for Recent Refugees: Segmented Labour Market in Twenty-first Century Australia’ (2006) 19 (2) *Journal of Refugee Studies* 203 in E Ott, PDES2013/16 para 51.

²⁶³ E Ott, PDES2013/16 para 51.

²⁶⁴ *Ibid*

²⁶⁵ E Ott, PDES/2013/16 para 41.

labour market.²⁶⁶ For example, only three out of 71 refugees had experienced paid work in a period of 18 months following their resettlement. In addition, the three were underemployed Iraqi men.²⁶⁷ Somali refugees in the United States of America were over-represented among welfare users and their rates of unemployment were very high.²⁶⁸

This experience can be compared to the 1563 Statute of Artificers in Elizabethan England, which confined certain occupations to certain social classes; and also to local regulations that reserved employment in a town for its own residents.²⁶⁹ Originally, the assumption was: ‘trade and traffic cannot be maintained or increased without order and government’.²⁷⁰ However, time came when such restrictions became ‘an offence against liberty of the subject and a menace to the prosperity of the nation’.²⁷¹ The courts decisively intervened, like in the case of *Mayor of Winton v. Wilks* (1705), where Chief Justice Holt stated: ‘All people are at liberty to live in Winchester, and how can they be restrained from using the lawful means of living there? Such a custom is an injury to the party and a prejudice to the public’.²⁷² Old customs and statute law (Elizabeth Statute of Artificers) were the main obstacles to the advance of the new system.²⁷³

Currently, there are no laws barring refugees to work in certain professions or in any part of the country. However, lack of access to gainful employment despite the necessary qualifications or experience can resemble the situation described by Marshall. Although it is now over 450 years since the Statute of Artificers was passed, refugees still face nearly similar realities. If one reflects on Marshall’s question he posed in his Cambridge paper: ‘The question’,

²⁶⁶ Ibid para 35.

²⁶⁷ Ibid 13.

²⁶⁸ Ibid para 38.

²⁶⁹ TH Marshall, ‘Citizenship and Social Class’ in C Pierson and FG Castles (eds), *The Welfare State Reader* (2nd edn, Polity Press 2006) 31; TH Marshall, ‘Citizenship and Social Class’ in S Leibfried and S Mau (eds), *Welfare States: Construction, Deconstruction, Reconstruction. Analytical Approach*, Vol 1 (Edward Elgar Publishing 2008) 89-137, 97.

²⁷⁰ Ibid.

²⁷¹ Ibid.

²⁷² King’s Bench Reports (Holt) 1002.

²⁷³ TH Marshall, ‘Citizenship and Social Class’ in TH Marshall and T Bottomore, *Citizenship and Social Class* (Pluto Press, 1992) 8-17, 11 < file:///D:/Marshall%20-%20Development%20of%20Citizenship.pdf > accessed 24 October 2017.

he said, ‘is not whether all men will ultimately be equal – that they certainly will not be – but whether progress may not go on steadily, if slowly, till, by occupation at least, every man is a gentleman. I hold that it may, and that will.’²⁷⁴ The same question can still be posed but this time with reference to refugees under the Gap.

2.3.7 Temporary work, minimal wages, unskilled, semi-skilled and underemployment

As has been noted, the Gap is complex and cannot be studied or explained using one or a few variables. In the United Kingdom, paid work for refugees tends to be temporary and at minimum wage level.²⁷⁵ In 2012, refugees entering the labour market were paid an hourly average wage of \$9.27 against \$21.29 of the general population.²⁷⁶ Another survey in the United States of America found that three-quarters of Hmong and Somalis, and two-thirds of Russians, had estimated annual earnings of US\$30,000 or less, even though most of them had arrived in the country more than 10 years earlier.²⁷⁷ Compared with the general population, the earnings were considered low. In addition to earning low wages, refugees are often employed in demanding and difficult work with little opportunity for improvement and advancement. These jobs can be dangerous, difficult, dirty, demeaning and demanding (the five Ds). However, 5-D jobs are not necessarily low-paid jobs.

One survey in Norway found that working on the oil ridge in laundry, reception, canteen, cleaning and other welfare services, the catering staffs’ annual wages averaged 638,000 Norwegian Kroner (about \$80,600).²⁷⁸ 58 per cent of them had either primary or secondary education.²⁷⁹ However, a study in Winnipeg, Canada, revealed that refugees work with little pay

²⁷⁴ TH Marshall, ‘Citizenship and Social Class’, in S Leibfried and S Mau (eds), *Welfare States: Construction, Deconstruction, Reconstruction: Analytical Approach*, Vol1 (Edward Elgar Publishing 2008) 89, 90-91. See also E Guild, *The Legal Elements of European Identity: EU Citizenship and Migration Law* (Kluwer Law International 2004) 52.

²⁷⁵ O Evans and R Murray, ‘The Gateway Protection Programme: An Evaluation’ (Home Office, London 2009) 6 in E Ott, PDES/2013/16 para 42.

²⁷⁶ E Ott, PDES /2013/16 para 43

²⁷⁷ M Potocky-Tripodi, ‘Refugee economic adaptation: Theory, evidence, and implications for policy and practice’ (2003) 30 (1) *Journal of Social Service Research* 63 in Ott, PDES/2013/16 para 44.

²⁷⁸ L Taraldsen, ‘De har 638.000 i Lønn: Under Halvparten har Høyere Utdanning’, *Teknisk Ukeblad* (11 March 2014) (They earn 638,000 kroner in Wages: Less than Half have Higher Education) < <http://e24.no/jobb/de-har-638-000-i-loenn-under-halvparten-har-hoeyere-utdanning/22803667> > accessed 14 September 2017

²⁷⁹ *ibid.*

and little chance of advancement even though the region had a robust economy.²⁸⁰ ‘Refugees in particular face hardships of higher unemployment rates, lower wages, and longer jobless periods’.²⁸¹ Under such circumstances, poverty among refugees and over-welfare usage, becomes inevitable. For example, a 2012 survey in the United States of America showed that the poverty rate among Somalis was around 51 per cent - the highest rate among newcomers and twice that of traditional African-Americans.²⁸² In another study, the situation in Iceland was seen as a source of discontentment among refugees, who felt they were being held back.²⁸³ Refugees, like other immigrants, are highly vulnerable to economic downturns.²⁸⁴ This is often due to temporary²⁸⁵ job contracts held by most immigrants, who also suffer more than natives from last-in-first-out practices.

Qualitative studies have confirmed the existence of the Gap. Because refugees are not often differentiated from immigrants, studies can be justified not to treat them separately. Such evidence, however, was generated mainly through qualitative studies. The thesis proceeds to the observed quantitative correlations that further confirm the existence of the Gap.

2.4 Quantitative correlations

Qualitative studies have shed light on the existence and the complexity of the Gap. However, other studies have explored the issue quantitatively.²⁸⁶ As already noted, there is no single factor that causes the Gap and there are no precise ways to measure it. However, several correlations have been identified. The correlations are not causations either. One of the

²⁸⁰ E Ott, PDES/2013/16 para 46.

²⁸¹ E Ott, PDES/2013/16 para 41.

²⁸² Ibid 38.

²⁸³ Iceland, Ministry of Social Affairs, ‘Attitudes and Experiences of Refugees Regarding Adaptation to Icelandic Identity’ (2007) 6 in E Ott, PDES/2013/16 para 47.

²⁸⁴ C Dustmann, A Glitz and T Vogel, ‘Employment, Wages, and the Economic Cycle: Differences between Immigrants and Natives’ (2010) 54 (1) *European Economic Review* 1; E Barth, B Bratsberg and O Raaum, ‘Identifying Earnings Assimilation of Immigrants under Changing Macroeconomic Conditions’ (2004) 106 (1) *Scandinavian Journal of Economics* 1 in T Valkonen and V Vihriälä (eds), *The Nordic Model: Challenged but Capable of Reform* (TemaNord 2014:531 Nordic Council of Ministers 2014)183.

²⁸⁵ International Labour Organization, Convention 175 (adopted 24 June 1994 entered into force 28 February 1998). May be denounced 28 February 2018-28 February 2019) (Part-Time Worker’s Convention).

²⁸⁶ E Ott, PDES/2013/16, 19-22.

difficulties with correlations in studies of the Gap is that the population of resettled refugees is constantly in flux. Some refugee populations stop arriving (South East Asians and Eastern Europeans, for example) while new ones like Syrians, Burmese and Bhutanese suddenly appear.²⁸⁷ Knowledge of the local language is positively correlated with employment, for example.

However, one needs to treat such an observation with care, as better language skills can indicate higher levels of education, which in turn can lead to an increased likelihood of employment. Normally, *ceteris paribus*, higher language levels can lead to employment; it can also be true that employment leads to higher language levels. Higher language levels can also indicate lower levels of trauma, increasing the likelihood of employment. Language normally reduces communication barriers. Lack of proficiency of the local language leads to a feeling of inferiority complex, uneasiness and lack of spontaneity.²⁸⁸ This can lead to failure to express feelings, develop complicated thoughts or explanations.²⁸⁹ A person lacking local language skills can be perceived as boring, simple-minded or even stupid by those fluent in the language of concern.²⁹⁰ In some instances, however, language proficiency is not significantly correlated with employment status.²⁹¹ In Queensland, Australia, refugees got jobs that required minimal language skills.²⁹² Some studies in the Netherlands confirmed the hypothesis that language proficiency is positively and is significantly correlated with employment status while others rejected it.²⁹³ Generally, simple correlations may need contextual approaches in interpretation. Results from correlations should therefore be restrictively interpreted.

²⁸⁷ E Ott, PDES/2013/16 para 66.

²⁸⁸ M Valenta, *Finding Friends after Settlement. A Study of the Social Integration of Immigrants and Refugees, their Personal Networks and Self-work in Everyday Life* (PhD thesis delivered at the Faculty of Social and Educational Sciences, Norwegian University of Science, and Technology, NTNU 2008) 15.

²⁸⁹ Ibid.

²⁹⁰ M Valenta (2008) *ibid*.

²⁹¹ E Ott, PDES/2013/16 para 62.

²⁹² Ibid para 21.

²⁹³ E Ott, PDES/2013/16 para 62.

Eleanor Ott summarized the ‘global-local’ studies that have been quantitatively carried out and the following hypothesized correlations were statistically significant: ²⁹⁴

- Demographic variables, that is, gender and age, household arrangement (marital status, presence of children and household size), country of origin and ethnic group, time in a country, citizenship, length of time worked, disability, health variables, mental well-being variables and mood disorders;
- Pre-resettlement history including trauma history, number of years as a refugee and initial language level;
- Human capital that includes self-efficacy, acculturation attitudes, education level, host country language skills, qualifications or training undertaken since arrival and recognition of overseas qualifications;
- Assets in the receiving community such as sponsorship and government programmes, language classes, geographic region and owning a car; and
- Social capital including social networks (ethnic enclaves and familial connections) and employment rate of non-Western immigrant and co-ethnic men.

All these factors were tested quantitatively and their correlations with the Gap could not be ignored; however, it should be stressed again that correlation is not causation. Identifying and understanding the probable causes of the Gap can help in finding solutions and thereby mitigating the effects. The multiple issues facing victims can rapidly dissipate once the causes are known. Once again, the literature can throw more light on this. Having explored some of the hypothesized causes of the Gap, the thesis proceeds to capture some of the effects of the Gap.

2.5 Some consequences of the Gap

Like any other social or legal issue, the Gap comes with consequences. There are numerous health issues resulting from the Gap. Others are poverty and social exclusion. The effects of long-term unemployment have been studied in greater details on resettlement refugees’ overall health. As in the general population, employment significantly correlates with lower stress rates and lower rates of clinical mental well-being issues, and can lead to improved

²⁹⁴ E Ott, PDES/2013/16, 19-20.

physical health.²⁹⁵ However it is difficult to measure all the effects because the causal mechanisms are not well-known.²⁹⁶ A 2013 study conducted in Finland concluded that long-term unemployment in early adulthood exceeding 500 days was associated with shorter Leukocyte Telomere Length (LTC) among men, than when employment was continuous.²⁹⁷ Shortened telomere are associated with tumours that can develop into various types of cancers. Employment outcomes can be predicted based on, *inter alia*, refugee's physical health and other demographic factors. Physical health correlated with employment in Australia among resettled refugees but studies on this relationship are significantly low.²⁹⁸ For example, after control of overlapping results, a random sample study on Russian, Somali and Hmong refugees in Minneapolis-St. Paul in the United States of America showed that gender, disability (a health factor), education and household composition correlated with economic outcomes.²⁹⁹

Empirically, studies have constantly shown that when persistent unemployment, marginalization and poverty become severe, a person can suffer from concentration problems and cannot focus beyond the immediate needs; work productivity and self-control are not only significantly reduced but are also eroded.³⁰⁰ Generally, long-term unemployment of one year or longer can have 'scarring' effects that might include sleep problems, feelings of shame and guilt, and serious health issues combined with reduced financial possibilities. People's entire careers can be ruined, particularly in the young. In the United States of America, for example, the mortality rate among workers laid off for more than a year is over 50 per cent higher than the average.³⁰¹ It can thus be concluded that long-term unemployment is disastrous for peoples' health. Poverty is a violation of human rights when: a) violation of non-poverty rights results into

²⁹⁵ E Ott, PDES/2013/16 para 63.

²⁹⁶ Ibid.

²⁹⁷ L Ala-Mursula et al. 'Long-Term Unemployment Is Associated with Short Telomeres in 31-Year-Old Men: An Observational Study in the Northern Finland Birth Cohort 1966' (2013) 8 (11) *PloS ONE* (Tenth Anniversary) 1-8 < <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0080094>, <https://doi.org/10.1371/journal.pone.0080094> > accessed 14 September 2017.

²⁹⁸ E Ott, PDES/2013/16, 21.

²⁹⁹ E Ott, PDES/2013/16, 21.

³⁰⁰ S Markussen and K Røed, *Leaving Poverty Behind? The Effects of Generous Income Support Paired with Activation* (Institute of Labour Research, Discussion Paper Number 8245, 2014); E Clarence and M Peromingo, *When Unemployment Becomes a Long-term Condition* (World Association of Public Employment Services 2013) < http://wapes.org/en/system/files/en-long-term_unemployment_2013.pdf > accessed 14 September 2017.

³⁰¹ E Clarence and M Peromingo *ibid*.

poverty; b) poverty results into discriminating against, despising and disrespecting the victims of poverty (systematic exclusion of the poor from society) and; c) there is an absence of capabilities indicative of existence of a need.³⁰² This last interpretation is based on assumption that all human rights derive from the existence of certain human needs.³⁰³ It is even more dangerous when a person finds himself/herself at the edge of an abyss of poverty and exclusion.

2.5.1 Poverty and multiple exclusion

As has been noted, the Gap partly refers to the high levels of chronic or long-term unemployment among refugees and the gnawing lack of occupation attainment (upward work mobility both occupationally and geographically). It results in relative poverty that also leads to material deprivation (exclusion from consumption) and social exclusion. People who are materially deprived and socially excluded frequently become liabilities to themselves, their families and society as a whole. A study in Norway, for instance, studied poverty rates by studying (a) changes in the share of individuals going into poverty (entry rates) and (b) changes in the share of individuals leaving poverty (exit rates).³⁰⁴ It was found that the probability of immigrants from Asia, Africa and South America to remain in poverty for more than two consecutive years was about 55-60 per cent. The corresponding entry rate was about 6-10 per cent. Among the native population, only about 40 per cent remained in poverty over a period of two consecutive years and the entry rate was about 1 per cent. The study also showed that dependence on State support was substantial and was estimated to be 20.3-26.8 per cent for the same population of immigrants. The estimates imply that if any randomly chosen group of immigrants is poor one year, the probability of being poor the following year increases by 20.3 to 26.8 percentage points.³⁰⁵ Refugees unintentionally become the 'new undeserving poor', seen as deserving less compared to other needy groups like the elderly, the disabled, or the unemployed

³⁰² T Campbell, 'Poverty as a Violation of Human Rights: Inhumanity or Injustice?' in P Alston, R Goodman and HJ Steiner (eds), *International Human Rights in Context: Law, Politics, Moral* (3rd edn OUP 2007) 310.

³⁰³ T Campbell, *ibid.*

³⁰⁴ M Bhuller and EE Brandsås, 'Fattigdomsdynamikk blant innvandrere: En empirisk analyse for perioden 1993-2011' (*Rapporter* 40/2013, SSB, Oslo-Kongsvinger September 2013) (Povert Dynamism among Immigrants: An Empirical Analysis for the Period 1993-2011) (Statistics Norway, Reports 40/2013, Septmeber 2013). Summary in English is available on page 5.

³⁰⁵ *Ibid* 5.

[natives].³⁰⁶ Principles of welfare redistribution according to merit, need and equality are thus challenged because as a *quid pro quo*, benefits should be preceded by work and taxes paid by the recipient.³⁰⁷

2.5.2 Loss of social status, ‘brain waste’ and academic derelicts

One seminal paper concluded that the higher one’s former occupation status, the worse the subjective experience with adjustment.³⁰⁸ The situation of Iraqi refugees resettled globally has been highlighted a case where people have experienced a ‘stark decrease in socio-economic status and relative earnings’ compared to their former lives in Iraq.³⁰⁹ In Alberta, Canada, another study revealed that 39 per cent of refugees worked in professional or managerial positions in their countries of origin; after resettlement the figure was only 7 per cent.³¹⁰ The rest were in blue collar jobs or in clerical, sales, services and technicians’ positions. Another study on Eritrean, Ethiopian, Iraqi and Sudanese refugees in Australia found a higher percentage with qualifications greater than their employment warranted and above the level of Australian-born colleagues.³¹¹ A 2007 survey in Iceland showed that of all the refugees resettled between 1956 and 2003, only 260 remained there. The 62 people surveyed said their occupations had not built on their previous work in their countries of origin; 28 of them were now unskilled workers, compared to 11 who were unskilled before moving to Iceland.³¹² The conclusion was that in general, refugees become occupationally immobile and lose social status, which in turn psychologically affects them because of their employment in unskilled or semi-skilled jobs.³¹³ On the issue of lower status jobs available after resettlement, another research indicates that ‘a

³⁰⁶ T Reeskens and W van Oorschot, ‘Disentangling the “New Liberal Dilemma”: On the Relation between General Welfare Redistribution Preferences and Welfare Chauvinism’ (2012) 53 (2) *International Journal of Comparative Sociology* 121.

³⁰⁷ Ibid 132.

³⁰⁸ BN Stein, ‘Occupational Adjustment of Refugees: the Vietnamese in the United States’ (1979) 13 (1) *International Migration Review* 25 in E Ott, PDES/2013/16 para 49.

³⁰⁹ E Ott, PDES/2013/16 para 52.

³¹⁰ E Ott, PDES/2013/16 para 49.

³¹¹ V Colic-Peisker and F Tilbury, ‘Employment Niches for Recent Refugees: Segmented Labour Market in Twenty-First Century Australia’ (2006) 19 (2) *Journal of Refugee Studies* 203-229 in E Ott, PDES/2013/16 para 50.

³¹² Ministry of Social Affairs 2007, 6 in E Ott, PDES/2013/16 para 47.

³¹³ E Ott, PDES/2013/16, 15.

massive loss of occupational status seems to be endemic'.³¹⁴ The prevalence of underemployment in all refugee communities irrespective of education has been referred to as 'brain-waste'.³¹⁵ Refugees become academic derelicts.

2.6 The Gap in the Nordics

Sweden resettles more refugees than Finland and Denmark combined. Its annual quota has averaged 1,900³¹⁶ for many years since 1950. Even in EU standards, Sweden resettled more refugees than the rest of the EU15.³¹⁷ 'If all EU15 countries had matched the Swedish per-capita inflow rate of this decade, they would have received five million refugees more than they actually did (in fact they received in total 740,000 refugees in 2005–14).'³¹⁸

Finland's quota was 750³¹⁹ and Denmark's was 500.³²⁰ The corresponding quota for Norway³²¹ was approximately 1,500 although the yearly average is roughly 1,100.³²² The Gap in the Nordics does exist at a significant level. One study by Lundborg³²³ that used highly detailed data on blue-collar workers in Sweden observed that refugees' employment lagged behind that of

³¹⁴ Ibid 16.

³¹⁵ Ibid

³¹⁶ UNHCR, *Country Chapters: UNHCR Resettlement Handbook* (July 2011, revised September 2014, revised October 2016) < www.unhcr.org/3c5e5a219.pdf > accessed 14 September 2017.

³¹⁷ J Ruist, 'The Fiscal Impact of Refugee Immigration' in B Bratsberg et al., *Nordic Economic Policy Review: Labour Market Integration in the Nordic Countries* (TemaNord 2017:520, Nordic Council of Ministers 2017) 211-233, 232.

³¹⁸ J Ruist *ibid*.

³¹⁹ Finnish Immigration Services, 'Quota Refugees' < www.migri.fi/asylum_in_finland/quota_refugees > accessed 14 September 2017.

³²⁰ New to Denmark, 'Quota Refugees' < www.nyidanmark.dk/en-us/coming_to_dk/asylum/quota_refugees/quota_refugees.htm > accessed 14 September 2017.

³²¹ Ministry of Foreign Affairs, 'UNHCR' < www.regjeringen.no/globalassets/upload/ud/vedlegg/fn/profilark2013/profilark2013-eng/unhcr.pdf > accessed 14 September 2017.

³²² Figures from the Norwegian Directorate of Immigration (UDI) indicate that from 2002 to 2011 inclusive, an average of 1,107 refugees have been resettled although the official target was 1,500 < www.udi.no/arsrapport2011/Statistikk/Tabell-17/ > accessed 7 April 2012.

³²³ P Lundborg 'Refugees' Employment Integration in Sweden: Cultural Distance and Labour Market Performance' (2013) 21 (2) *Review of International Economics* 219.

the general population for their entire lifetime in Sweden. One Norwegian newspaper³²⁴ ran an article where it noted that for over 20 years ie since 1992, there had been 23 government action plans and 672 measures, but unemployment among immigrants³²⁵ was still three times higher than among nationals. In 2010, immigrants made up 10 per cent of the Norwegian population. Their unemployment rate was about 30 per cent - the highest rate among the Organisation for Economic Co-operation and Development (OECD) countries.³²⁶ According to the Government of Norway's report in the Universal Period Review (UPR), unemployment has historically been about three times higher for immigrants, and the employment rate disparity between women and men with immigrant background is greater than between the sexes generally in the population.³²⁷

Furthermore, Statistics Norway, the official gatherer of statistics in Norway, reported that by the fourth quarter of 2010, the level of resettled Iraqis who were not in any 'gainful employment'³²⁸ was about 66 per cent.³²⁹ The Report also noted that the rates were 56 per cent among Burmese refugees (most likely recent arrivals), 48 per cent among Iranians and 37 per cent among Vietnamese. The highest unemployment levels were among Somalis (75 per cent) followed by Eritreans at 73 per cent. It should be noted that the Somalis had lived in Norway a little longer than the Eritreans, and it was somewhat surprising that they were the most unemployed group. Compared to all immigrants, the percentage of the unemployed was about 38.³³⁰

³²⁴ O Stokke and S Gedde-Dahl, '20 år. 23 andlingsplaner. 672 tiltak. Men fortsatt er arbeidsledigheten blant innvandrere tre ganger så høy' (20Years, 23 Action Plans, 672 Measures: But the Unemployment among Immigrants is Three Times So High', Aftenposten (13 December 2013) < www.aftenposten.no/nyheter/iriks/20-ar-23-handlingsplaner-672-tiltak-Men-fortsatt-er-arbeidsledigheten-blant-innvandrere-tre-ganger-sa-hoy-7053268.html#.Uuw_nrQ0_D4 > accessed 15 December 2013.

³²⁵ The difference between refugees after resettlement and ordinary immigrants is blurred. The labour market equates reasons for migration with purposes of migration.

³²⁶ AB Djuve and KR Tronstad 'Innvandrere i Praksis: Om Likeverdige Tjenestetilbud i NAV' (Fafo-rapport 2011:07, Oslo 2011), 27 (Immigrants in Apprenticeship: About Equal-Value Service Provision in NAV, Fafo report 2011:07).

³²⁷ UNGA A/HRC/WG.6/19/NOR/1 (Human Rights Council, Working Group on the Universal Periodic Review, National Report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, Nineteenth session, 28 April–9 May 2014) 6.

³²⁸ 'Sysselsetting' roughly means 'gainful employment' and includes the self-employed, those employed by others and perhaps those on labour activation programmes.

³²⁹ K Henriksen, 'Overføringsflyktninger i Norge' (SSB, Rapporter 7/12 Oslo-Kongsvinger, Februar 2012) (Resettlement Refugees in Norway, Statistics Norway, Reports 7/2012 February 2012) 26.

³³⁰ Ibid.

Refugee unemployment rates varied greatly in Norway in the last quarter of 2009. Whereas the number of Somalis who were in employment were 32 per cent and those from Iraq were 43 per cent, those from Chile and Sri Lanka averaged 70 per cent.³³¹ For the majority population (women, men and older workers ie aged 55-64), the average rate of employment was 78 for men and 75 for women.³³²

The situation in Finland was similar: half the Somalis who had lived in Helsinki for 15 to 20 years had completed degrees in Finland but were unemployed.³³³ Unemployment among Somalis, Afghans and Iraqis was over 50 per cent.³³⁴ On the contrary, unemployment among nationals was 7.8 per cent. Up to the end of 2017, these groups 'had substantially lower employment rates, earned less and received more social benefits than other immigrants groups or natives in 1990-2013.'³³⁵ Worse still, when government introduced austerity measures, the low-income group was disproportionately hard- hit and, "When [economic] growth starts up again, those in work and on good incomes benefit the most", admitted the Prime Minister of Finland Juha Sipilä.³³⁶ Therefore, the poor-group to which most refugees belongs, will have tougher times even during times of economic boom.

³³¹ G Brochmann and AS Grødem, 'Migration and Welfare Sustainability: the Case of Norway' in E Jurado and G Brochmann (eds), *Europe's Immigration Challenge: Reconciling Work, Welfare and Mobility* (IB Tauris 2013) 59-76, 64-5

³³² Ibid 64.

³³³ 'Major Unemployment Differences among Immigrant Groups', Yle (7 May 2010) < http://yle.fi/uutiset/major_unemployment_differences_among_immigrant_groups/1663217 > accessed 2 March 2014.

³³⁴ Ibid.

³³⁵ M Sarvimäki, 'Labour Market Integration of Refugee in Finland' in B Bratsberg et al., *Nordic Economic Review: Labour Market Integration in the Nordic Countries* (TemaNord 2017:520, Nordic Council of Ministers 2017) 91-114, 91.

³³⁶ 'Sipilä Admits Government Policy has Hurt the Poor', Yle (14 September 2017) < https://yle.fi/uutiset/osasto/news/sipila_admits_govt_policy_has_hurt_the_poor/9832043 > accessed 14 September 2017.

In Sweden,³³⁷ the median income of foreign-born³³⁸ people aged 20-64 in 2011 was 14,400 Swedish Krona, compared to 19,000 Krona among native Swedes. Lastly, the report shows that the rate of Swedish-born citizens aged 24-64 who were in gainful employment was 82 per cent, against 57 per cent of foreign-born people.³³⁹ The report further noted: ‘...The share of gainfully employed [people] is lower among foreign-born persons, despite a long duration of residence, than among Swedish-born persons; and when one looks at different regions of birth, foreign-born persons from Africa and Asia continue to have the weakest position in the labour market’.³⁴⁰ For further comparison, more than 80 per cent of non-European Union (EU) nationals³⁴¹ aged 15-64 residing and working in the EU were profiled as low-skilled or unskilled.³⁴² In his general article, *Work and Refugee Employment in Sweden*, Miguel Peromingo also observed that failure to recognize refugee’s tertiary education aggravates their employment situation. Finland, for example, recognizes up to 21 per cent of Russian migrants’ education against under 10 per cent of Somalis’ education.³⁴³

2.6.1 The structure of the Nordic labour market

The nature and scope of the Nordic labour market is complex. Generally, the Nordic countries are not only industrialized and rich, but they are also deeply committed to principles of social democracy and equality of their citizens. They developed a unique model of administration famously called the Scandinavian Model, the Nordic Model or simply the Model. The Model is universalistic, that is, it includes the entire population (all legal citizens)

³³⁷ Statistics Sweden, ‘Integration - a Description of the Situation in Sweden: Considerable Differences Remain among Swedish and Foreign Born Persons’ (Statistical news from Statistics Sweden, Number 2013:305, Örebro December 2013), 14 < www.scb.se/en_/Finding-statistics/Statistics-by-subject-area/Living-conditions/Living-conditions/Integration---analysis/Aktuell-pong/224589/Behallare-for-Press/367983/; www.scb.se/Statistik/_Publikationer/LE0105_2013A01_BR_BE57BR1301.pdf > accessed 3 May 2014.

³³⁸ The category ‘foreign born’ is an all-embracing term which means that all the parents of the person are not Swedes. This automatically includes resettled refugees as well.

³³⁹ Ibid (n 337), 128.

³⁴⁰ Ibid, 129. Note that foreign-born Africans and Asians could mostly have refugee background.

³⁴¹ Non-European Union nationals could encompass refugees.

³⁴² M Peromingo is a consultant at the World Association of Public Employment Services (2014) < www.fmreview.org/en/faith/peromingo.pdf > accessed 5 February 2016.

³⁴³ Ibid.

irrespective of their prior contribution through taxes and other insurance schemes.³⁴⁴ The State broadly participates in various economic activities and aspects of social life. The Model is also egalitarian in nature. It gives the poor access to a minimum standard of income and social services. It thus brings those who would otherwise have been poor closer to the general standard of living of their society, and redistributes income.³⁴⁵ Sir William Beveridge's 'Five Giants' - want, ignorance, disease, squalor and idleness - have been, to a large degree, defeated.³⁴⁶ However, idleness among refugees has proved endemic and undefeatable unless new ways are devised. In Norway, for instance, the Model became successful after World War II (in the 1960s) and the central themes were democracy, modernization and citizenship.³⁴⁷

In the theoretical Model, labour power is not a commodity (unlike in the capitalist model).³⁴⁸ The Model rejects, and does not equate labour to commodities where, for instance, welfare is derived from cash nexus.³⁴⁹ Welfare benefits or entitlements do not depend on earnings (cash nexus), kinship (family) or community altruism, but rather on social citizenship.³⁵⁰ Through social programmes, an adequate standard of living is achievable if, for instance, politics guarantees it. Want as well as an individual's economic position are often de-commodified in the Model, since citizenship and need are sufficient conditions to qualify for welfare benefits.³⁵¹ De-commodification occurs when a service is rendered as a matter of right,

³⁴⁴ R Erikson et al., *The Scandinavian Model. Welfare States and Welfare Research* (M.E. Sharpe 1987), vii.

³⁴⁵ Ibid, viii.

³⁴⁶ N Timmins, *The Five Giants: A Biography of the Welfare State* (HarperCollins Publishers 1995) 1.

³⁴⁷ G Brochmann and AS Grøden, 'Migration and Welfare Sustainability: The Case of Norway' in E Jurado and G Brochmann, *Europe's Immigration Challenge: Reconciling Work, Welfare, and Mobility* (IB Tauris 2013) 59-76, 59.

³⁴⁸ E-A Gösta and W Korpi, 'From Poor Relief to Institutional Welfare States: The Development of Scandinavian Social Policy' in R Erikson et al. (eds), *The Scandinavian Model: Welfare States and Welfare Research* (M.E. Sharpe 1987) 40.

³⁴⁹ E-A Gösta and W Korpi, 'From Poor Relief to Institutional Welfare States: The Development of Scandinavian Social Policy' in Erikson et al., *The Scandinavian Model: Welfare States and Welfare Research* (M.E. Sharpe 1987) 40.

³⁵⁰ Ibid. See also G Brochmann and AS Grøden, 'Migration and Welfare Sustainability: The Case of Norway' in E Jurado and G Brochmann, *Europe's Immigration Challenge: Reconciling Work, Welfare, and Mobility* (IB Tauris 2013) 59-76, 60.

³⁵¹ E-A Gösta and W Korpi, 'From Poor Relief to Institutional Welfare States: The Development of Scandinavian Social Policy', in Erikson et al. eds., *Scandinavian Model: Welfare States and Welfare Research* (M.E. Sharpe 1987), 40-1.

and when a person can maintain a livelihood without reliance on the market³⁵² The Model has ‘pushed further into civil society than is internationally common’.³⁵³

2.6.2 Expensive labour

The Model absorbs resettled refugees as they get sustained social assistance, but it can be hard to escape. Labour is expensive. In September 2016, average monthly wages for fulltime, permanent employees in Norway were 42,600 Kroner (about \$5,400), which increased to 43,300.³⁵⁴ In 2017, the Norwegian government taxation portal, *Altinn*, estimated that if an employee earned an annual gross salary of 400,000 Kroner (about \$50,600), the employer could end up paying up to 470,645 Kroner³⁵⁵ (\$59,500). This includes taxes paid by the employer, in addition to various insurances and pensions schemes. Employees often also receive fringe benefits in the form of, *inter alia*, gifts, free or subsidized meals, telephones/internet, subsidized holidays in company-owned cottages, Christmas parties and cheap bank loans. Permanent employees must also have about six weeks’ paid leave a year. While they are away, employers fill their posts by temporarily hiring workers who are paid higher wages but without further benefits. Mothers who give birth while in full-time permanent employment can choose payment of 80 per cent of their monthly salary for 50 weeks or 100 per cent for 40 weeks.³⁵⁶ New fathers also receive benefits at a level dependent on how much the mother worked before giving birth.

³⁵² E-A Gösta, ‘Three Worlds of Welfare Capitalism’ in C Pierson and FG Castles (eds.), *The Welfare State Reader* (2nd edn, Polity Press 2006), 163.

³⁵³ *Ibid.*

³⁵⁴ SSB, ‘*Lønn, alle ansatte 2016: Gjennomsnittlig Månedslønn for alle Ansatte Kvinner og Menn i Ulike Sektorer*’ (Updated 1 February 2017), (Statistics Norway, ‘Wages, all employees 2016: Average monthly wages for all women and men in employment in all different sectors’ < <https://ssb.no/arbeid-og-lonn/statistikker/lonnansatt> > accessed 16 September 2017.

³⁵⁵ Altin, ‘*Arbeidsgiverguiden*’ (The Employers’ Guide) < www.altinn.no/Global/Starte%20og%20drive%20bedrift/Guider/Arbeidsgiverguiden.pdf > accessed 3 August 2017.

³⁵⁶ NAV, ‘*Spesielt om Foreldrepenger til Far*’ (Particularly about Parental Monetary Benefits for Father) < www.nav.no/no/Person/Familie/Venter+du+barn/spesielt-om-foreldrepenger-til-far--347656#chapter-3 > accessed 3 August 2017.

Employees with children get tax credits of 25,000 Kroner for the first child and 15, 000 Kroner for each additional child.³⁵⁷

On the other hand, new mothers without work qualify only for a lump-sum payment. Most refugee women or women married to refugees do not receive the employment-related advantages unless they have worked and paid taxes. The question arises of whether employers could be reserving the advantages for nationals at the cost of refugees, or even wishing to weaken the Model by inundating it with clients. Furthermore, with basic needs provided at minimum level by the State, employers could be seen as having no impetus to hire refugees. Consequently, many refugees become trapped by the system and remain permanently as welfare dependents.

To be locked out of the labour market for decades and sometimes permanently is very challenging, both physically and psychologically. State provision is clearly welcome in the short-term, but to remain needy and in a low-income group for over a decade comes with its own troubles. In such circumstances, Michel Foucault might have rightly concluded: 'Need is also a political instrument, meticulously prepared, calculated and used'.³⁵⁸ To Fraser, welfare societies are 'stratified, differentiated into social groups with unequal status, power and access to resources'.³⁵⁹ In short, these are societies that refugees join without prior knowledge that they are 'traversed by pervasive axes of inequality along lines of class, gender, race, ethnicity and age'.³⁶⁰ In such situations, refugees face major challenges.

³⁵⁷ Tax Norway, 'Parental Allowances' < www.skatteetaten.no/en/International-pages/Felles-innhold-benyttetes-i-flere-malgrupper/Articles/Deductions/ > accessed 3 August 2017.

³⁵⁸ M Foucault, 'Discipline and Punish: The Birth of Prison' (Trans. Alan Sheridan, Vintage 1979) 26 in N Fraser 'Talking about Needs: Interpretive Contests as Political Conflicts in Welfare-State Societies' (1989) 99 (2) *Ethics*.

³⁵⁹ N Fraser 'Talking about Needs: Interpretive Contests as Political Conflicts in Welfare-State Societies' in S Leibfried and S Mau, *Welfare States: Construction, Deconstruction, Reconstruction: Legitimation, Achievement and Integration*, Vol 3 (Edward Elgar Publishing 2008) 41.

³⁶⁰ N Fraser *ibid*.

2.6.3 Labour as a commodity

As observed by Gösta and Korpi, the labour market is a key determinant of the living conditions of the wage earners.³⁶¹ Labour is a commodity and being unable to sell it to the market results in unequal distribution of resources, for example, power, between parties. Upon resettlement, however, the immediate and most important resource refugees arrive with is labour. As noted by Mikkola, today's workers rely less on their physical strength than on their brains, using thought processes, communication and co-operation with others.³⁶² Labour or human capital itself can be limited because it is narrow in scope, its domain is small, it has low concentration potentials and its degree of convertibility is also low.³⁶³ Everybody can offer some of it. Labour cannot easily initiate action and for it to have value, there must be capital.³⁶⁴ There is strong evidence that labour depends on employment opportunities provided by employers.³⁶⁵

However, labour is a special commodity: it cannot be severed from its possessor, cannot be sold except in cases of slavery, and can be hired for limited time where the buyer (employer) practically owns it during working hours or employment contracts.³⁶⁶ In this way, the labourer subordinates himself/herself to the directives of management, since it is capital through management that hires labour and not *vice versa*.³⁶⁷ In such circumstances, refugees join the polarized Nordic labour market already struggling with the relationship of authority and subordination seen as the root cause of division into class.³⁶⁸ Strong trade unions are among the solutions to this class-like dilemma which the Scandinavian Model could be trying to limit.

³⁶¹ E-A Gösta and W Korpi, 'From Poor Relief to Institutional Welfare States: The Development of Scandinavian Social Policy', in R Erikson et al. (eds.), *Scandinavian Model: Welfare States and Welfare Research* (M.E. Sharpe 1987) 45.

³⁶² M Mikkola, *Social Human Rights of Europe* (Karelactio 2010) 4.

³⁶³ W Korpi, 'The Democratic Class Struggle and Social Policy' (1983) in S Leibfried and S Mau (eds.), *Welfare States: Construction, Deconstruction, Reconstruction, Analytical Approach*, Vol 1 (Edward Elgar Publishing Limited 2008) 347, 356.

³⁶⁴ W Korpi 'The Democratic Class Struggle and Social Policy' (1983) *ibid*. See also Lucacs (1922) 165-6 in A Woodiwiss, *Human Rights* (Routledge 2005) 9-10.

³⁶⁵ M Mikkola *ibid* (n 362)

³⁶⁶ *Ibid* 356.

³⁶⁷ W Korpi *ibid* (n 363) 347, 357.

³⁶⁸ *Ibid*.

2.6.4 Trade unions

In its preamble, the 1919 International Labour Organization Convention aims at improving the conditions of workers everywhere in the world.³⁶⁹ It states that universal and lasting world peace based on social justice can be achieved by eliminating conditions of labour that involve injustice, hardship and privation, seen as the root cause of unrest that imperiled peace and harmony.³⁷⁰ Trade unions are stronger entities in the Nordics than in many other democracies, and membership is a social right. Since their birth, unions have yearned for collective action by wage-earners to increase their power in cases of dispute with employers, the 'juristic persons' or corporate actors who own capital and other means of production.³⁷¹ When strongly organized wage-earners meet equally and efficiently organized employers to negotiate what is 'just', 'fair' or 'reasonable' *vis-à-vis* other groups of citizens, the weaker and unorganized usually suffer the consequences. 'Weak groups often accept, or are taught to accept, circumstances which stronger groups would consider unjust, and strong actors also tend to develop more long-range definitions of their interests than weaker groups.'³⁷²

Trade unions meanwhile tend to take protectionist attitudes towards immigration, except in targeted sectors with demonstrable shortages. Following Freeman's 'Modes', trade unions tolerate immigration that is complementary to national labour and oppose immigration that substitutes it.³⁷³

By collating the aims and objectives of the Nordic trade unions and those of the strong, pro-labour rights political parties and unionized employers, the Model should have developed and sustained itself as a compromise between the three.³⁷⁴ The Model may, in addition, be aiming at weakening or moderating wage-earners' dependence on the employment opportunities provided by organized employers. The provision of extensive social services, for example, may

³⁶⁹ C Tomuschat, *Human Rights: Between Idealism and Realism* (2nd Collected Courses of Academy of European Law Vol XIII/1 OUP 2003) 20.

³⁷⁰ For additional roles of trade unions, at least in Anglo-American countries, see Harry Arthurs, 'Labour Law After Labour' in G Davidov and B Langille (eds), *The Idea of Labour Law* (OUP 2011) 13, 13-14.

³⁷¹ W Korpi *ibid.*, 347, 357.

³⁷² *Ibid.*

³⁷³ GP Freeman 1995.

³⁷⁴ Examples: The Confederation of Norwegian Enterprises ('*Næringslivets Hovedorganisasjon*', NHO), the Confederation of Swedish Enterprises ('*Svenskt Näringsliv*'), Confederation of Danish Employers ('*Dansk Arbejdsgiverforening*', DA), and '*Confederation of Finnish Industries*' (EK).

be to a larger extent intended at the emancipation of individuals from market dependence, thus the de-commodification of some goods and services.³⁷⁵ In the Nordics, ‘pre-industrial modes of social production’, for example, ‘family, the church, noblesse oblige, and guild solidarity’ are no longer functional because of ‘social mobility, urbanization, individualism, and market dependence’.³⁷⁶

These circumstances create unique challenges for resettled refugees given all their initial vulnerabilities. The Model universally protects citizens but might also be permanently locking out those without access to the labour market, weaker groups in general, and resettlement refugees in particular. It creates dependence and addiction by providing the minimum and not guiding its clients to provide themselves with this, even when they are capable. This could be one of its unintended consequences: power as a resource becomes more unevenly distributed. Together with other weak and marginalized groups in any society that depend on welfare benefits, resettlement refugees have no command over the arena of resources including money, property, knowledge, psychic and physical energy, social relations and security, even when they do their best.³⁷⁷

In the industrialized Nordic countries, and indeed in many other countries, access to society’s resources which individuals have control over is mainly through employment. Resources can be economic or a professional background that can influence access to other social goods like influence and prestige.³⁷⁸ Individual control over resources is important because individuals are active beings, can control and purposely direct their living conditions and therefore should not be treated as passive beings whose needs are ‘assured by the flow of goods

³⁷⁵ E-A Gösta, ‘The Three Political Economies of the Welfare State’, ‘Decommodification in Social Policy’ and ‘The Welfare State as a System of Stratification’ in L Liebfried and S Mau, eds. *Welfare States: Construction, Deconstruction, Reconstruction, Analytical Approach*, Vol 2 (Edward Elgar Publishing 2008) 3.

³⁷⁶ Ibid 7.

³⁷⁷ R Erikson and H Uusitalo ‘The Scandinavian Approach to Welfare Research’ in R Erikson *et al.* (eds) *The Scandinavian Model: Welfare States and Welfare Research* (M.E. Sharpe 1987) 189.

³⁷⁸ Sosialdepartementet, ‘Flyktningers tilpasning til det norske samfunn’ (NOU1986:8, Desember 1985) (‘Official Norwegian Reports, NOU 1986: 8’), 18. See complete report in Norwegian, Sosialdepartementet, ‘Flyktningers tilpasning til det norske samfunn: en utredning etter oppdrag fra Sosialdepartementet avgitt i desember 1985’ (Universitetsforlaget 1985) (Norway, Ministry of Social Affairs, ‘Refugees’ adaptation to the Norwegian Society, a study commissioned by the Ministry of Social Affairs released in December 1985’, University Publisher 1985).

and services'.³⁷⁹ But because of the powerlessness of the recipients of welfare benefits, the Model keeps providing minimum resources that keep them alive but can become a morass and from which escape is not easy for resettlement refugees.

For Torben *et al.*, the Model succeeded because the population was small and ethnically homogenous.³⁸⁰ Because of this ethnic and religious homogeneity, trust developed and this resulted in improvement and efficiency due to coordinated action. The labour market was at one time closed, but as time progressed, the Nordic countries opened their labour market to globalized labour and the result was higher productivity and income, Torben *et al.* noted. But when refugees or immigrants join the Nordics as a community, it becomes heterogeneous in religion and ethnicity. This 'increased openness, therefore, gives rise to fear among workers as well as resistance by trade unions and political decision-makers'.³⁸¹ The potential for a class-based feeling of solidarity may be constrained by heterogeneity that may eventually erode redistribution from welfare, as in the case of the USA.³⁸² Again, there is an assumption that individuals belonging to the same group generally support each other. Norms of social justice and solidarity can be complicated by people from outside the group.³⁸³ Locking refugees out of the labour market, and giving them minimal support while blaming them for all life's uncertainties, could be a logical decision.

Currently the Nordic labour market is characterized by *inter alia*, high unionization, highly coordinated wage bargaining geared to wage compression, and active labour market policies.³⁸⁴ A 2013 study by the Organization for Economic Cooperation and Development (OECD) found that the Nordic countries were the most unionized.³⁸⁵ In Finland and Denmark, as

³⁷⁹ R Erikson and H Uusitalo *ibid* (n 377). It should be noted that the definition of content of welfare is left to the individual person.

³⁸⁰ AM Torben *et al.*, *The Nordic Model: Embracing globalization and sharing risks* (The Research Institute of the Finnish Economy, ETLA, Helsinki 2007), 39; Koikalainen *et al.*, *Welfare or Work: Migrants' Selective Integration in Finland* (University of Lapland Finland 2011).

³⁸¹ AM Torben *et al.* *ibid* 31.

³⁸² AW Schmidt and DC Spies, 'Do Parties "Playing the Race Card" Undermine Natives' Support for Redistribution? Evidence from Europe' (2014) 47 (4) *Comparative Political Studies* 1.

³⁸³ *Ibid*.

³⁸⁴ AM Torben *et al.* *ibid* 40.

³⁸⁵ K Nergaard, 'Antall fagorganiserte og organisasjonsgrad i Norge' (Number and Degree of Organization of Trade Unions in Norway) (FAFO, 12 May 2017) <www.arbeidslivet.no/Lonn/Fagorganisering/Antall-fagorganiserte-og-organisasjonsgrad-i-Norge/> accessed 5 February 2016.

many as 69 per cent of workers were unionized, closely followed by Sweden (68 per cent) and Norway (55 per cent). The corresponding percentages elsewhere were Canada 27, Australia 18, USA 11 and France 8.³⁸⁶ Analysis reveals inter-sectoral differences: for example, 81 per cent of public sector employees in Norway are organized, compared with only 23 per cent in commerce and trade.³⁸⁷ Managers and academics were the most organized professions, with 64 per cent of workers unionized, while jobs requiring less education (in commerce and trade) were only 38 per cent unionized. Resettlement refugees can end up paying the price, facing long periods - or even their entire lives - unemployed. In general, the more professional and organized the employees, the harder it is for immigrants and refugees to penetrate that particular sector. Becoming a manager could be many times harder than working at supermarket tills, for instance.

2.6.5 Employment dilemma: Insiders versus Outsiders theory

In the ‘Insider versus Outsider’ theory of employment, incumbent workers are the ‘Insiders’ who enjoy privileges like higher wages that may be above market value, often realized through legislation (e.g. minimum wage).³⁸⁸ Firms do not hire from outside, even though it may be cheaper, because of the higher costs incurred during hiring and firm-specific training. Firing incumbent workers is also expensive as most ‘Insiders’ insulate themselves by belonging to trade unions where they can strike, work to rule,³⁸⁹ and join picket lines.³⁹⁰ Insiders can also resist competition through non-cooperation (e.g. absenteeism),³⁹¹ and can even harass Outsiders whom they suspect may undercut wages or bring a different psychology to the workplace. In such an environment, it is harder for Outsiders to enter employment, even in cases where they could be passive absorbers of rules and regulations. Djuve and Tronstad confirm that because of strong

³⁸⁶ ‘*Organisasjonsgrad blant arbeidstakerne*’ (The degree of organization among the workers) < www.arbeidslivet.no/PageFiles/9977/Orggrad-land.png > accessed 15 September 2017.

³⁸⁷ K Nergaard, ‘*Hvem er Organisert – og Hvor?*’ (Who is Organized and Where?) (FAFO 19 April 2016) < www.arbeidslivet.no/Lonn/Fagorganisering/Hvem-er-organisert---og-hvor/ > accessed 05 February 2016.

³⁸⁸ A Lindbeck and D J Snower, ‘Insiders versus Outsiders’ in S Leibfried and S Mau (eds), *Welfare States: Construction, Deconstruction, Reconstruction: Legitimation, Achievement and Integration* (Edward Elgar Publishing 2008) 177-200.

³⁸⁹ For example, an employee might refuse to answer a telephone call from a customer.

³⁹⁰ Striking employees might assemble in front of their workplace and try to persuade non-striking workers not to enter the premises.

³⁹¹ H Arthurs, ‘Labour Law After Labour’ in D Guy and B Langille (eds), *The Idea of Labour Law* (OUP 2011) 14.

job protection, hiring and firing workers is expensive and therefore very few Norwegian employers are willing to take these risks.³⁹²

2.6.6 Hope, drama and despair after the obligatory local language training

Free local language training courses at beginners and intermediate level are offered to all refugees resettled in the Nordics. For example, refugees in Norway aged 16 to 67 have a right and a duty to undergo 550 hours of Norwegian language training and 50 hours of social studies.³⁹³ This amounts to 30-37.5 hours per week in a full-time programme for two years, ending in an intermediate-level examination in the Norwegian language. The ‘one-size-fits-all programme’ and syllabus apply equally to all refugees whatever their family or professional background in their country of origin is different; and the expectation from the authorities is to pass the exams and take out loans to finance further studies, or to find employment. At this point, very few refugees do master the language sufficiently to secure a job; most register with local welfare administrators (NAV) to take up different short-term, labour-market orientated courses where many end up trapped. Drama, frustration and complete despair follows.

A report on these courses offered by the New Labour and Welfare Administration (NAV) was published by Institute for Labour and Social Research (Fafo).³⁹⁴ Immigrants were a priority group according to NAV. Non-Europeans, ie immigrants born outside the Organization for Economic Co-operation and Development (OECD) are on average unemployed for longer periods than natives. A whole 4,300 out of 5,550 (over 77 per cent) participants on the different courses were non-Europeans.³⁹⁵ Immigrants’ unemployment rates in Norway were lower than in other OECD countries but the difference between the native born (Norwegians) and immigrants was higher in Norway than in many other OECD countries.³⁹⁶

³⁹² AB Djuve and KR Tronstad, ‘*Innvandrere I Praksis: Om Likeverdig Tjenestetilbud i NAV*’ (Nettutgave, Fafo-rapport 2011:07, Oslo 2011) (‘Immigrants in Practice: About Equal Services in NAV’, Online edition, Fafo-report 2011:07).

³⁹³ The Introduction Act Number 80, 4 July 2003, s17.

³⁹⁴ AB Djuve and KR Tronstad, Fafo report 2011:07 ibid 28.

³⁹⁵ Ibid.

³⁹⁶ OECD, *International Migration Outlook* (SOPEMI edition 2010) in Fafo report 2011:07, 27.

In the same report, eight out of 10 caseworkers believed it was difficult to find a course that suited non-European immigrants with poor language skills. Job-clubs and job-search courses were often offered despite the fact that the NAV had many other measures. Participants learnt how to write cover letters and curriculum vitae, and trained for job interviews.

According to the same report, participants from immigrant backgrounds needed more qualifications before being ready for work. Practical courses like working in warehouses and learning to drive forklift trucks were very popular among immigrants, although the market demand for employees with such qualifications was limited or inundated. Internships lasted from three to nine months or sometimes longer. For example, 18 per cent of women participants from a non-European background had spent 13 months in internships. NAV caseworkers often chose participants based on their language capabilities, rather than experience, competence and earlier participation in courses. The caseworkers expected internship candidates to improve their language skills and gain knowledge about Norwegian working life. Interns were not always expected to find work at the placement, but the schemes were seen as positive in the long term. However, repeated internships that resulted in no job offer had a negative impact on the participants, especially when they saw themselves as being used for free labour. A vivid example was offered by the service director of NAV, Bjorn Gudbjørgrud, who confirmed that there was a mismatch between what Somalis as a group needed and what the NAV courses could offer.³⁹⁷ Activation had become humiliation; apprenticeships (traineeships) without job offers pure exploitation. This came in the context that there were more than 36,000 Somalis in Norway, two-thirds of whom were endemically poor.

The situation was compounded by the NAV's lack of capacity to monitor the situation due to pressure of work: 62 per cent of staff said their workload made it difficult to monitor non-European interns. Both employers and participants abused the system. There were clear indications that participants from non-European backgrounds had narrower service offers, poor quality courses, poor places for training and monitoring than the others. For example, 77 per cent of the NAV caseworkers interviewed said it was difficult to find appropriate courses for non-

³⁹⁷ O Stoke, '*Somaliere er frustrerte over Nav. Nav er enig med dem*' Aftenposten (6 October 2014) (Somalis are frustrated with NAV. NAV agrees with them) < www.aftenposten.no/nyheter/iriks/Somaliere-er-frustrerte-over-Nav-Nav-er-enig-med-dem-7733688.html > accessed 7 October 2014.

European immigrants who were not fluent in Norwegian.³⁹⁸ Seven out of 10 NAV employees wholly or partially agreed that participants from non-European backgrounds were very motivated to find work but employers were generally skeptical about employing immigrants.³⁹⁹ Even within the NAV, only six per cent of the employees interviewed had an immigrant background and most were from Eastern Europe followed by Asia.⁴⁰⁰

Although NAV courses were provided by highly educated and experienced individuals, the outcome was mostly poor. For example, the requirements to win bids to run the courses included competence in working with immigrants who have little formal education and weak language skills; together with a concrete plan for fulfilling the programme.⁴⁰¹ The motives of the employers were not clear, but the NAV knew that some who frequently employed interns were motivated by reducing labour costs.⁴⁰² The companies were also given financial support by the NAV while receiving the free labour. Meanwhile new candidates are ready to try their luck, most of them drifting from one course to another and from one internship to another without accomplishing anything, in some cases for decades. In some cases, participants become worn down, suffered mental breakdowns or gave up trying and became welfare dependents. In other cases, participants could succeed in securing jobs they may not have initially considered, such as taxi driving, cleaning or working in care homes.

If refugees have poor language skills or poor education, this could put them on a par with less educated natives whose ‘cognitive sophistication’ is assumed to be lower than their more educated counterparts, as noted by Van Der Waal *et al.*⁴⁰³ Compared with less educated natives, resettlement refugees still have a lower performance in the labour market, irrespective of their education and other competencies. On the other hand, NAV employees and those running the labour market courses are well-informed and belong to the creative elites equipped with

³⁹⁸ AB Djuve and KR Tronstad, Fafo report 2011:07, 9.

³⁹⁹ Ibid

⁴⁰⁰ Ibid 21.

⁴⁰¹ Ibid 33.

⁴⁰² Ibid 34.

⁴⁰³ The less educated are generally also assumed to be less equipped cognitively, according to Van der Waal *et al.*, ‘Some are more equal than others’: economic egalitarianism and welfare chauvinism in the Netherland’ (2010) 20 (4) *Journal of European Social Policy* 350.

‘cognitive structure that subsumes content of scope and diversity capped by concepts of higher order of abstraction that allows them to make sense of a broad range of events’.⁴⁰⁴ How and why such informed and experienced employees fail to get their clients into the labour market, even though this is part of their expertise, is not easy to understand. What is known is that long-term unemployment is virtually always accompanied by despair, hopelessness and poverty.

2.6.7 The relationship between poverty, long-term unemployment and the Gap

To understand poverty and its dynamism, one needs to reflect on what history offers. Historically, poverty has been shown to be a result of social inequality that is purposeful and necessary: necessary because it provides the incentive to work and designs the distribution of power.⁴⁰⁵ But, when inequality becomes excessive, as in case of those without access to labour market, poverty and indigence may be inevitable.⁴⁰⁶ According to Booth and Rowntree, a large number of people were ‘poor through no fault of their own but because of tendencies within the market system’.⁴⁰⁷ The British passed the Poor Law of 1834 to fight poverty which was found to be rooted in social maladjustment (tendencies within the market system) and not through individual irresponsibility or incapacity.⁴⁰⁸ Society let the poor down, and not *vice versa*. According to Rowntree, there was a cycle of poverty in families where wages were to blame. It is argued further that the 1934 Factory Acts in Britain were designed to ‘trespass on the territory of the wage systems’ to partially rescue the aged, the sick, those ‘incapable of continuing the battle and other weaklings who gave up the struggle, admitted defeat and cried for mercy’.⁴⁰⁹

⁴⁰⁴ Van der Waal *et al.*, *ibid* 351.

⁴⁰⁵ TH Marshall, ‘Citizenship and Social Class’ in L Liebfried and S Mau (eds), *Welfare States: Construction, Deconstruction, Reconstruction. Analytical Approach*, Vol 1 (Edward Elgar Publishing 2008) 89.

⁴⁰⁶ TH Marshall, ‘Citizenship and Social Class’ in L Liebfried and S Mau *ibid*, 106, quoted Colquhoun in ‘A Treatise on Indigence’ (1806); where poverty is understood as a situation of a man who, owing to lack of any economic reserves, is obliged to work, and to work hard, to live. Indigence meant the situation of a family which lacked the minimum necessary for decent living.

⁴⁰⁷ A Briggs, ‘The Welfare State in Historical Perspective’ in C Pierson and FG Castles (eds), *The Welfare State Reader* (2nd edn Polity Press 2006) 16, 23.

⁴⁰⁸ *Ibid* 24.

⁴⁰⁹ TH Marshall, ‘Citizenship and Social Class’ in C Pierson and FG Castles (eds), *The Welfare State Reader* (2nd edn Polity Press 2006) 30, 32, 33.

Those who accepted relief ‘crossed the road that separated the community of citizens from the outcast company of the destitute’.⁴¹⁰ Richard Titmuss also observed the possibility of a link of humiliation by loss of status, dignity (self-respect), pauperism and shame (stigma) by those using publicly provided goods without attribution.⁴¹¹ They could become a public burden although there are instances where the market and the family were unable or not willing to cover certain needs, continued Titmuss. In short, the insightful writing and anti-poverty programmes of the past find echoes in today’s experience of poverty among resettlement refugees in the Nordics. Little seems to have changed over the years if a person falls into the predicament of long-term unemployment. As a consequence of the Gap, it is necessary to understand what poverty means in practical terms.

Despite their economic robustness and Model, the Nordics have some people living in poverty, in common with any other group of countries. There is ‘people’ as well as ‘place’ poverty.⁴¹² The former is a situation in which a low regional welfare performance can be attributed to an overrepresentation of population groups that tend to be poor irrespective of location; while the latter means regional variations in welfare levels for people with similar professional and educational characteristics. After resettlement, refugees become part of both ‘people’ and ‘place’ poverty. Finding a method that can be used to measure the exact number of the poor can be hard work. However, the concept of poverty includes low or small resources: a low standard of living that has consequences on how people live and ‘resources so small as to exclude them from minimum acceptable way of life’.⁴¹³ Even this is not a complete definition of poverty, since it is dynamic, ie defined according to time, place, economic level and social convention/custom of the society concerned.⁴¹⁴

⁴¹⁰ Ibid 33.

⁴¹¹ R Titmuss, ‘Universalism versus Selection’ in Pierson and Castles (eds), *The Welfare State Reader* (2nd edn Polity Press 2006) 40.

⁴¹² A Aase, ‘Living Conditions in a Marginal Region: The Case of Finnmark’ in Erikson *et al.* (eds), *Scandinavian Model: Welfare States and Welfare Research* (M.E. Sharpe, 1987) 221-232.

⁴¹³ S Ringen, ‘Poverty in the Welfare State?’ in R Erikson *et al.* (eds), *Scandinavian Model: Welfare States and Welfare Research* (M.E. Sharpe 1987) 122-138, 123.

⁴¹⁴ In the *Wealth of Nations*, Adam Smith gave a general definition of poverty where commodities were vital. Currently, this definition is no longer wholly acceptable, see S Ringen *ibid* 124.

Poverty can be objectively measured but the definition depends on how people live, Ringen notes.⁴¹⁵ It is the result of insufficient resources: both having low resources and the consequences of having low resources.⁴¹⁶ Poverty means exclusion from society, as the poor are usually excluded and isolated from the rest of the community.⁴¹⁷ It also involves multiple deprivation:⁴¹⁸ once deprived in one area like income, a person loses other benefits such as property and cannot afford holidays, for instance. Lastly, poverty also results in an ‘accumulation of deprivation’, as low resources increase the probability of deprivation in other areas.⁴¹⁹

It is hard to analyze the consequences of the Gap without understanding what it means to be poor. A 2013 Norwegian report, *Dynamism of Poverty among Immigrants*, for example, empirically analyzed poverty for the period 1993- 2011.⁴²⁰ Poverty rates among immigrants from Asia and Africa stabilized at 12 to 20 per cent from an initial 50 per cent. Interpreted differently, at any one moment, one should expect that between 12 and 20 per cent of Asian and African immigrants living in Norway could be categorized as poor. The rates of poverty also differed significantly. Whereas the number of unemployed immigrants of African origin in 2012 was approximately seven times that of the general population, that of Asians was just four.⁴²¹ Finding an explanation for this is challenging, and this research will continue to look for more evidence by studying poverty through the prism of children, the indirect sufferers of the consequences of the Gap. Following Ytterstad’s newspaper article, approximately 84,300 children were living in

⁴¹⁵ S Ringen, ‘Poverty in the Welfare State?’ in R Erikson *et al.* (eds), *Scandinavian Model: Welfare States and Welfare Research* (M.E. Sharpe 1987) 126.

⁴¹⁶ Ibid 127.

⁴¹⁷ Ibid 128.

⁴¹⁸ Ibid 128.

⁴¹⁹ Ibid 133.

⁴²⁰ M Bhuller and Brandsås, ‘*Fattigdomsdynamikk blant innvandrere: En empirisk analyse for perioden 1993-2011*’ (Statistics Norway, Report 40/2013) 5.

⁴²¹ O Stokke and S Gedde-Dahl, ‘*20 år, 23 handlingsplaner, 672 tiltak: men fortsatt er arbeidsledigheten blant innvandrere tre ganger så høy*’, Aftenposten (24 November 2012), (20 years, 23 action plans, 672 measures: but unemployment among immigrants continues to be three times so high) <www.aftenposten.no/nyheter/iriks/20-ar-23-handlingsplaner-672-tiltak-Men-fortsatt-er-arbeidsledigheten-blant-innvandrere-tre-ganger-sa-hoy-7053268.html#Uq2DX-KX_qs> accessed 16 September 2017.

families with a persistently low income in 2015 in Norway.⁴²² At the beginning of 2017, the number had soared to almost 100,000 although there is no official statistics on poverty in Norway.⁴²³ Another survey showed that the percentage of immigrant children from Somalia, Iraq and Afghanistan living in homes where poverty was persistently high at about 75, 57 and 51 per cent respectively.⁴²⁴ They were over-represented among the poor. In the Official Norwegian Government Report,⁴²⁵ children from an immigrant background were greatly over-represented among households with persistently low income (25 per cent against 8.2 per cent of the overall population) for the period 2006-2008. In the same period, 37 per cent of children and young people under 18 from immigrant families lived in homes with a persistently low income; the equivalent figure among the general population was 7.6 per cent.⁴²⁶ These percentages represent a significant number of people, as immigrants made up about 12 per cent of the Norwegian population. Poverty was attributed to lack of income-generating activities, mostly due to long-term unemployment. Long-term unemployed parents are, most of the time, poor. This type of misery is easily transferred to their children. Child poverty is defined as ‘the share of children living in a household whose equivalent annual income lies below the poverty threshold – lower than 60% of a country’s median equivalized disposable income.’⁴²⁷

A 2012 study of children aged 16 or below across the EU found that over 40 per cent of children in immigrant households lived in relative poverty, and such children were likely to be

⁴²² M Ytterstad, ‘*Dette er statsbudsjettet på 1-2-3: Skattelette til «ni av ti»*’, Dagbladet (7 October 2015) (This is the State Budget at 1-2-3: Tax Reductions to Nine out of Ten) < www.dagbladet.no/2015/10/07/nyheter/innenriks/politikk/statsbudsjettet2016/okonomi/41383274/ > accessed 7 October 2015.

⁴²³ M Giæver and I Brunborg, ‘*Her er det mest Barnefattigdom*’, NRK (29 March 2017) (Here are the most poor children) < www.nrk.no/norge/her-er-det-mest-barnefattigdom-1.13450344 > accessed 15 September 2017.

⁴²⁴ V Helljesen, ‘*3 av 4 somaliske barn i Norge er fattige*’, NRK (12 February 2015), (Three out of Four Somali Children in Norway are Poor) > www.nrk.no/norge/3-av-4-somaliske-barn-i-norge-er-fattige-1.12204008 > accessed 16 September 2017.

⁴²⁵ Barne- og likestillingsdepartementet, ‘*Bedre integrering: Mål, strategier, tiltak*’ (NOU 2011:14 Juni 2011) (Ministry of Children and Equality, ‘Better Integration: Goals, Strategies, Measures’, Official Norwegian Report 2011:14 June 2011) < www.regjeringen.no/nb/dep/bld/dok/nouer/2011/nou-2011-14/6.html?id=650799 > accessed 15 February 2014.

⁴²⁶ Ibid.

⁴²⁷ OECD/European Commission, *Indicators of Immigrant Integration 2015: Settling in* (OECD Publishing, Paris 2015) 268 < <http://dx.doi.org/10.1787/9789264234024-en> > accessed 29 January 2018.

exposed to poverty as their peers in native households.⁴²⁸ In North America, Australia and New Zealand, the number of immigrant children under poverty was less likely to be as twice that of children born of native parents.⁴²⁹ In the United States of America, for instance, slightly over 30 per cent (one third) of children were poor irrespective of parents' migration background.⁴³⁰ In Denmark, Finland and Norway, whereas children without an immigrant background who experienced relative poverty were under 10 per cent, and a little over 10 per cent in Sweden, the corresponding percentage was over 44 for children born of immigrant parents.⁴³¹

Research on the children of poor parents helps shed light on the Gap. For example, *Save the Children Denmark* concluded that poor children become poor adults.⁴³² The report notes that such children feel uncomfortable in school as they are subjected to both physical and verbal abuse. This inhibits their social and physical development, and their general well-being suffers. It is a negative spiral, since discomfort in school affects their progress even later in life. As adults, they continue to live a life of poverty. In Norway, increasingly, parents resorted to *Fattighuset* (literally 'the Poor House'), a charity organization where they got free clothes and toys for their children.⁴³³ These children felt excluded and were less integrated. Some children who could not buy expensive clothes or telephones, or could not participate in *extra-curricular* activities, rang the Norwegian Red Cross to express their feelings of exclusion as they did not have the same things as the rest of the children.⁴³⁴ The Gap's effects can be felt by children, even though they have no understanding of it. Poverty affects many people everywhere. However, the degree and

⁴²⁸ Ibid.

⁴²⁹ Ibid.

⁴³⁰ Ibid.

⁴³¹ OECD/European Commission, *Indicators of Immigrant Integration 2015: Settling in* (OECD Publishing, Paris 2015) 269 < <http://dx.doi.org/10.1787/9789264234024-en> > accessed 29 January 2018. The percentages are estimates from 'figure 13.32, relative poverty rates among children aged less than 16, 2012'.

⁴³² Save the Children Denmark, '*Fattigdom i Danmark*' ('Poverty in Denmark') < www.redbarnet.dk/Fattigdom-i-Danmark.aspx?ID=161 > accessed 8 Sept 2015.

⁴³³ Ibid.

⁴³⁴ Å Havelid, '*Barn tør ikke å ta med vennene hjem*', ('Children do not dare go home with their friends') (General Secretary, Norwegian Red Cross 2016); V Helljesen and C Wernersen, '*Hadde aldri trodd jeg skulle se sånn fattigdom i Norge*', NRK (1 September 2013) (Had never believed to see so much poverty in Norway) < www.nrk.no/valg2013/lange-koer-for-a-fa-hjelp-1.11198463 > accessed 2 February 2016.

extent to which refugees are affected in the Nordics is unacceptable. The Gap needs to be tackled from another angle. The Gap seems to be immune to the current solutions.

2.7 Conclusion

The Gap has been thoroughly explored in many of its multi-dimensional characteristics. What starts as a 'normal' process which almost every resettlement refugee would expect to experience, namely a period of unemployment, can become a permanent way of life. In the long-term, refugees are expected to escape the Gap's claws but most do not. Again, because of lower wages and inability to advance in their careers, refugees find it hard to escape the Gap. The extent to which the Gap exists among refugee populations is a cause for alarm because the rate of participation in income-generating activities, for example, participation in gainful employment, self-employment, etc., is much lower than in the rest of the population.

The Gap has multiple causes: in the long-term, they are by and large exogenous but can also be endogenous as in the case of skills' incompatibility, demonstrable lack of local language proficiency, lack of useful network, poor physical and mental health, etc. Still, a range of factors like the structure of the labour market which is characterized by protectionist policies designed by powerful labour unions, are formidable forces. Over-priced wages, ideological battles between labour and capital, strong resistance to refugees' immigration, discrimination against non-Europeans and the belief in the 'halo effect' by some employers, can all take their toll on refugees. The overall labour market is organized in such a way that it absorbs most refugees within specific sectors like home-care, cleaning, and other dead-end jobs. Whenever possible, nationals avoid some jobs. Such jobs include flexible jobs with non-standard contracts, for example, temporary and part-time employment; zero hours, and on-call. Even under high wages, refugees cannot escape the Gap because they work fewer hours and therefore earn less. The Committee on Economic, Social and Cultural Rights was concerned with Finland's policy of extensive use of temporary employment contracts which de facto limits the capacity of part-time workers, stand-by workers and foreigners to enjoy labour rights set out in Articles 6, 7 and 8 of

the Covenant.⁴³⁵ The Committee recommended the State party to ‘take all necessary measures to ensure that temporary employment contracts are not used to circumvent the effective enjoyment of labour rights...’⁴³⁶

Although almost all refugees undergo obligatory language training to help them access the labour market or further education, many still do not escape the Gap. Participation in short-term labour market oriented courses or taking university education is not a decisive factor to acquire employment, nor is fluency in the local language. Refugees caught in this situation often descend into poverty and a sense of defeatism. With low resources and exclusion from consumption of certain goods, refugees resort to brutalizing the welfare system. However, the welfare system is not meant to circumvent the wage system but rather to protect the weakest members of society (for example, the young, the sick and the old who are unable to work physically), refugees’ access to welfare services injures a section of nationals. They may develop resistance to resettlement of more refugees. When poor members of society turn against other poor members, refugees in particular, mutual trust is lost and the overall integration process slows down. Refugees’ physical and mental health can degenerate faster. The loss of general well-being can have similar impacts on refugees’ children.

The causes, consequences and failure to craft remedies calls for a deep analysis of the methods used to reach the conclusions and the seriousness or commitment by the authorities to mitigate the Gap. For instance, most official statistics on poverty uses generic phrases like family of immigrants or non-European immigrants without specifically referring to refugees as a category suffering disproportionately. When studies about the Gap still use generic terms like Africans without referring to specific countries of origins, religion, marital status, number of children, education level and type, etc., a lot of important information may be hidden in the non-disaggregated statistics. When government agencies like NAV who are supposed to prepare and market refugees to the ‘*laissez-faire*’ labour market only end up sympathizing with refugees under the Gap, something difficult to comprehend must be happening. Why not declare defeat so that the government finds other ways?

⁴³⁵ CESCR, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant* (Concluding Observations of the Committee on Economic, Social and Cultural Rights, Finland, 16 January 2008 E/C.12/FIN/CO/5) para 15.

⁴³⁶ Ibid para 24.

By continuing to get resources from the government to train refugees but after a decade, or decades, nearly half are still unemployed and may even have become unemployable, NAV can become an accomplice. After general elections, for instance, governments sometimes change from centre-left to centre-right and vice versa but some of the most important NAV employees are permanent. NAV employees know much more about the situation than the new governments although the latter come with a lot of background information about the issue. If the different governments constantly come up with different strategies, measures, etc. to make refugees employable so that they too contribute to the welfare system but the result remains partially gloomy, the causes and hence solutions must be lying somewhere else. Again, every year, resettled refugees come from different countries but despite the difference, many struggle to enter the labour market. If subjects (refugees) change but the object ie the Gap remains intact in content and context, new and disparate approaches to study and comprehend the Gap becomes *sine qua non*.

The Gap can be studied through the prism of international human rights, regional as well country-specific laws. Accordingly, the Gap can be interpreted as a violation refugees' basic social and economic rights. The right to work is paramount as far as economic and social rights are concerned. When refugees are discriminated by the labour market, the right work is breached. Human rights show that individuals' rights are violated through acts of omission and commission. If part of the Gap is caused by *de jure* discrimination, human rights propose effective remedies, which may even involve the judiciary. To respect, protect and fulfil refugees' economic and social rights, like the right to work results into achieving other rights like the rights to own property either individually or in a group, etc. Refugees will no longer suffer from persistent poverty disproportionately, and they will be able to live as autonomous individuals. Dignity, equality and other norms of social justice defaced by the Gap can be restored, and new sense of belonging to their respective countries is achievable. Integration of refugees can be accelerated if their inalienable rights are protected and interpreted as justiciable. Respecting international human rights also means to domestically apply provisions of the already ratified human rights treaties and conventions. International human rights law tasks State authorities with protecting and fulfilling their human rights obligations towards their citizens through principles, policies and practices that must be assessed as progressive. Under the Gap, however, measures designed to mitigate it can stall and even become regressive when they fail to ameliorate the

problem. The next chapter will show that the Gap violates international human rights, regional as well national constitutions and other domestic legislation. The right to work and its importance will be the fulcrum of chapter three. Any solutions to ameliorate the situation will have to make many administrative adjustments and tackle other labour-market maladjustments. Finding solutions is futile if the poverty that accompanies the Gap is not treated as a violation of refugees' right to work.

Chapter 3. The right to work and the Refugee Gap

3.1 Introduction

The right to work is a fundamental right, well-established in international human rights law, ‘without which other rights are often meaningless’.⁴³⁷ It is grounded in the Universal Declaration of Human Rights, Article 23 (1).⁴³⁸ The other accompanying rights, like non-discrimination in payment for equal work, favourable working conditions and the right to join trade unions, cannot be realized if paragraph 1 of the Article is not respected.⁴³⁹ The 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) and its Optional Protocol transformed the aspirations of the Universal Declaration of Human Rights into legally binding obligations.⁴⁴⁰ States that sign and ratify such international documents are bound to respect and fulfil the obligations they contain.⁴⁴¹ Economic and social rights, which include the right to work, are legal norms within the United Nations human rights system, and may carry more legitimacy than domestic laws.⁴⁴² International human rights law emanates from human conscience, is a reflection of objective justice, embodies superior values, and rescues vulnerable groups from state voluntarism and unilateralism.⁴⁴³ The principal international instrument protecting the right to work is the ICESCR and its Optional Protocol.⁴⁴⁴

⁴³⁷ Committee on Migration, Refugees and Displaced Persons, Council of Europe Parliamentary Assembly, *Refugees, and the Right to Work* (Report/Doc. Number 13462, 24 March 2014 Rapporteur Mr. Christopher CHOPE). See also Statement of one of the framers of the Refugee Convention, Professor Louis Henkin of the United States delegation, United Nations Document E/AC.32/RS.37, 16 August 1950, 12 in the Michigan Guidelines on the Right to Work (2009-2010) 31 *Michigan Journal of International Law* 293, 295.

⁴³⁸ See also International Labour Organization (ILO), *ILO Declaration on Fundamental Principles and Rights to Work* (18 June 1998).

⁴³⁹ The rights are in UDHR art 23 (2-4).

⁴⁴⁰ A Rosas and Scheinin, *Implementation Mechanisms and Remedies*, in A Eide, C Krause and A Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff Publishers 2001).

⁴⁴¹ *Ibid.*

⁴⁴² AAC Trindade, ‘International Law for Humankind – Towards a New Jus Gentium’ (Nijhoff/The Hague Academy of International Law, Leiden/Hague (2010) in Haack *et al.* (eds), *Human Realisation of Human Rights: When Theory Meets Practice, Studies in Honour of Leo Zwaak* (Intersentia 2013).

⁴⁴³ *Ibid.* 24.

⁴⁴⁴ UNGA Res 63/117 (adopted 10 December 2008). See also P Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (OUP 2016) 366.

The right to work, which includes ‘the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts’, is a fundamental principle.⁴⁴⁵ The ‘core obligation’ of that Article is ‘to ensure non-discrimination and equal protection of employment’.⁴⁴⁶ By April 2017, a total of 71 countries were signatories to the ICESCR and a further 165 were Parties to it.⁴⁴⁷ Other international treaties also recognise the right to work.⁴⁴⁸ ‘Contracting States’, for example, are expected to accord refugees the ‘most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment,⁴⁴⁹ self-employment⁴⁵⁰ and practice in liberal professions if a refugee holds a diploma for such work.⁴⁵¹ Refugees’ right to work ‘must not be confused with reasons for flight’, and, as they are unable to return to their country of origin or nationality, and are without the protection of their own country, they ‘must have rights to work in the country of refuge’.⁴⁵²

Despite its importance and its inclusion in international legal texts, refugees’ right to work is one of the most complex, most neglected rights, whose violation is hard to directly attribute to States or private actors. When refugees’ long-term unemployment becomes persistent at a predictable rate of about 50 per cent in some communities, resulting in the Gap, questions about States’ obligations to protect and fulfil human rights obligations, among others, are raised. This chapter therefore discusses the right to work in the light of the legal duties that States

⁴⁴⁵ ICESCR Article 6 (1).

⁴⁴⁶ Thornberry P, *The International Convention on the Elimination of All of Forms of Racial Discrimination: A Commentary* (OUP 2016) 366.

⁴⁴⁷ United Nations Treaty Collection, Chapter IV, 3 ICESCR < https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en > accessed 22 April 2017.

⁴⁴⁸ C O’Cinneide, ‘The Right to Work in International Law’ in V Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart Publishing 2015) 99, 99.

⁴⁴⁹ The Refugee Convention

⁴⁵⁰ Art 18 *ibid*.

⁴⁵¹ Art 19 of the Refugee Convention. See also the UN Ad Hoc Committee on Refugees and Stateless Persons, Ad Hoc Committee on Statelessness and Related Problems, Status of Refugees, and Stateless Persons – Memorandum by the Secretary General, 3 January 1950, Document E/A.32/2, 1950, (UN Ad Hoc Committee on Refugees and Stateless Persons) art 13.

⁴⁵² The Michigan Guidelines on the Right to Work (2009-2010) 31 *Michigan Journal of International Law* 293.

assume when they sign and adopt laws developed from international, regional and domestic jurisprudence. If any right is to be recognized and respected, its *raison d'être* or justification must be understood.

3.2 Justification of the right to work

3.2.1 Economic justification: stimulation of consumption

Refugees' social and economic rights, including the right to work, 'are immediate duties rather than obligations of progressive implementation'.⁴⁵³ This understanding originates from the UN Ad Hoc Committee on Refugees and Stateless Persons, which observed that after shelter, refugees had to lead independent lives, become integrated into the economic system of their countries of asylum, and thereafter provide for their needs and their families.⁴⁵⁴ The purpose was to ensure that refugees did not continue to be maintained by international organizations. In the Nordics, international organizations are replaced by welfare offices. Most refugees are of working age who bring with them knowledge, skills and training, with the potential to fill gaps in the labour market and subsequently pay taxes and consume goods and services, which increase the host countries' revenues.⁴⁵⁵ It was observed that 'people in work are generally less likely to engage in criminal or anti-social activities, while the fewer people on social security the more resources government has to pursue other public end'.⁴⁵⁶

In Norway and the rest of the Nordics, an introduction programme⁴⁵⁷ teaches refugees the local language over two to five years as a right and an obligation. In general, when refugees duly complete 600 to 2,400 hours of language lessons, employment opportunities are created. Those

⁴⁵³ ICESCR art 2.

⁴⁵⁴ UN Ad Hoc Committee on Refugees and Stateless Persons, Ad Hoc Committee on Statelessness and Related Problems, Status of Refugees, and Stateless Persons – Memorandum by the Secretary General, 3 January 1950, Document E/A.32/2, 1950. See also B. Opeskin, R. Perruchoud and J. Redpath-Cross (eds), *Foundations of International Migration Law* (CUP 2012) 197.

⁴⁵⁵ Committee on Migration, Refugees and Displaced Persons, the Parliamentary Assembly of the Council of Europe, *Report/Doc 13462*, 24 March 2014, Rapporteur Mr. Christopher CHOPE) 6.

⁴⁵⁶ Jason NE Varuhas, *Damages and Human Rights* (Hart Publishing 2016) 354.

⁴⁵⁷ KR Tronstad and V Hernes, 'Komparativ analyse av introduksjonsprogram i Norge, Sverige og Danmark' (NIBR rapport 2014:19, 2014) (Comparative analysis of Introduction Programme in Norway, Sweden and Denmark, NIBR Report 2014:19, 2014).

who master the local language easily get jobs as instructors and administrators. Publishers of the text books used on the courses also benefit.

Furthermore, resettlement increases the local population artificially and expands the consumer market. An area with an old or declining population is rejuvenated when refugees (especially those with children) are resettled there. Local food sales increase and local farmers' income can increase owing to this increased consumption. Consumption of other products like clothes, electricity, public transport, etc. is also stimulated. Telephone companies, for instance, get new customers who make a high volume of calls to friends and relatives because of isolation and disorientation in the first years. Shareholders' dividends grow, sometimes exponentially, depending on the number of refugees (new customers). Average rental prices, too, rise. Landlords are assured of constant flow of tenants who will have no access to mortgages for many years, and sometimes for life. If a refugee is employed, the government tax base enlarges through, for example, Valued Added Tax/Goods and Services Tax (VAT/GST) and Pay as You Earn (PAYE) as table 3.1 shows.

VAT for 2016 averaged 24.75 per cent and a childless single worker who earned the average national wage paid almost 40 per cent in PAYE. It should be noted that VAT does not depend on whether a person is in gainful employment. The more a person consumes, irrespective of income, the more the person contribute to State coffers. In other words, VAT does not take earnings into account. It therefore adversely affects people on fixed incomes, such as refugees living on the means-calculated welfare benefits, or the minimum core of content. Again, if the majority population who work ungrudgingly pays up to 40 per cent of their hard earned income to the State, work must mean a lot more than wages or salaries.

Table 3.1: 2016 VAT⁴⁵⁸/GST and PAYE⁴⁵⁹ comparison in the Nordics

Country	VAT/GST (per cent)	PAYE (per cent)
Denmark	25	36.5
Finland	24	43.8
Norway	25	36.2
Sweden	25	42.8
Average ⁴⁶⁰	24.75	39.8

Source: OECD, Consumption Tax Trends 2016.

As regards pensions, refugees who reach pensionable age but who have lived a significant portion of their lives under the Gap also fare badly because, pensions above the minimum rate are paid according to, *inter alia*, the number of years worked and the sum total contributed to the pension system. The Nordic pension system is a ‘receive as you paid in too’. In short, access to minimum old-age pension requires three or more years of residence, full pension requires a minimum of 40 years, the same with disability pension, and to claim unemployment insurance and sickness leave, a person must have worked for at least some years.⁴⁶¹ Refugees living under the Gap therefore miss out on both current employment income and future pension income.

3.2.2 Redistribution of resources

Fulfilment of the right to work demands that everyone is given equal access to opportunities which society has control over. Provision of paid work is the most common avenue through

⁴⁵⁸ OECD, *Consumption Tax Trends 2016: VAT/GST and Excise Rates, Trends and Policy Issues* (Table 2.A2.1 VAT rates) 83 < www.oecd-ilibrary.org/docserver/download/2316351e.pdf?expires=1508778176&id=id&accname=oid026390&checksum=056D519610A5E7ABFD1B81C48C1D301B > accessed 29 April 2017.

⁴⁵⁹ OECD, *Taxing-Wages: Comparative Tables* < <http://stats.oecd.org/Index.aspx?DataSetCode=AWCOMP> > accessed 29 April 2017.

⁴⁶⁰ Simple average: $(25+24+25+25)/4 = 24.75$ and $(36.5+43.8+36.2+42.8)/4 = 39.83$.

⁴⁶¹ G Brochmann and AS Grøden, ‘Migration and Welfare Sustainability: The Case of Norway’ in E Jurado and G Brochmann, *Europe’s Immigration Challenge: Reconciling Work, Welfare, and Mobility* (IB Tauris 2013) 59-76, 62.

which such resources can be equitably redistributed. Under normal conditions of employment, workers are fairly remunerated. Remuneration is understood, *inter alia*, as the provision to employees of a minimum wage or salary that includes direct and indirect emoluments in cash or kind, which should be equal for men and women for equal work of equal value.⁴⁶² Remuneration is important in securing an adequate standard of living for an individual. Work, in addition, contributes greatly to the survival [and wellbeing] of a person and his or her immediate family, helps their development, and enhances their recognition within a community.⁴⁶³ The assumption is that the least well-off, including those who have experienced inequality from birth [and as a result of their geographic origins], but who can work and achieve ‘equality of outcome’, are protected through work.⁴⁶⁴

3.2.3 Equality of opportunities versus equality of results

Equality requires, *inter alia*, that ‘all people in the same situation be treated equally and that people in different situations be treated differently’.⁴⁶⁵ Equally trained or educated refugees, for instance, should be treated in the same way as any other similarly trained or qualified immigrants or nationals who do not have a refugee background. However, many factors work against the principle of equality, whose interpretation is crucial. Equality can be interpreted to mean:

- a) Individuals are treated according to their original situation. This can already be seen in earnings-related benefits, where, for example, those with the highest wages receive the highest pensions. Applying this principle more widely may require, for example, paying unemployed refugees wages equivalent to those of equally qualified/trained nationals in active employment. The original situation is similar education or training, differentiated only by employment/unemployment.
- b) Individuals are treated according to an agreed universal principle. Unemployed and perhaps unemployable *refugees* who have similar qualifications and training can for example be given a similar basic monthly salary as long as they qualify as *refugees*.

⁴⁶² ILO, *Equal Remuneration Convention* (C100 adopted 29 June 1951 Entered into force 23 May 1953) Article 1.

⁴⁶³ CESCR, *General Comment Number 18*.

⁴⁶⁴ A Clapham, *Human Rights: A Very Short Introduction* (OUP 2007), 143.

⁴⁶⁵ M Mikkola, *Social Human Rights of Europe* (Karelactio 2010) 9.

- c) Individuals are treated according to certain criteria, where for example the most vulnerable who have cumulative disadvantages receive more attention or special protection. This could include policies such as the waiving of loans taken out by refugees to acquire education which did little to help in securing jobs, or ‘active equality’ policies such as fixed quotas for the employment of refugees.⁴⁶⁶

Generally, ‘equality of opportunities’ is individualistic and its aim is to secure fairness of an individual by advocating removal of unjustified discrimination especially in the decision-making processes.⁴⁶⁷ Merit, efficiency and achievement ought to be respected in liberal societies, the quintessence of social justice.⁴⁶⁸ In order to promote equality of opportunities, no candidate should be recruited because of his or her country of origin, ethnic background, gender, etc. Individuals must compete for jobs exclusively on the basis of characteristics needed for the satisfactory performance of the jobs,⁴⁶⁹ that is, the genuine determining factors. These factors can be seniority and competence.⁴⁷⁰ Given serious consideration by decision-makers, equality of opportunities can allow ‘social mobility, up or down’, in accordance with job-seekers qualifications, talents, skills, working experience, etc. ‘Freedom of choice’ and ‘free competition between individuals’ are thus given meaning.⁴⁷¹

However, equality of opportunities is criticized because, ‘equality cannot depend on individual performance’ only.⁴⁷² Other factors like the level of prejudice, discrimination, preference of certain groups of individuals or specific gender, etc., can hinder some groups to achieve equality of opportunities in any given society. The aims of the decision makers should be to fix the outcomes of decision-making processes, with the objective of improving the relative positions of ‘disadvantaged groups’.⁴⁷³ Refugees groping with the Gap can be identified as

⁴⁶⁶ Norway, the Ethnicity Anti-Discrimination Act (2013), chapter 3.

⁴⁶⁷ UN, Economic and Social Council, *Prevention of Discrimination: The Concept and Practice of Affirmative Action* (Final report submitted by Mr. Marc Bossuyt, Special Rapporteur, in accordance with Sub-Commission resolution 1998/5, 17 June 2002, E/CN.4/Sub.2/2002/21) para 32.

⁴⁶⁸ Ibid para 32.

⁴⁶⁹ Ibid para 33.

⁴⁷⁰ Ibid para 43.

⁴⁷¹ Ibid.

⁴⁷² Ibid para 34.

⁴⁷³ Ibid.

individuals in need of special protection. Justifying the right to work may also require looking at equality through the mirror of equality of results.

Equality of opportunities, on the other hand, argues that talents, skills, etc are not evenly distributed. Some groups, for example, the poor, minorities, women, etc., must be helped to uplift themselves if opportunities are to be evenly distributed. Equality of results, however, disagrees. The ‘average’ performance of individuals does not differ tremendously since talents and skills are distributed ‘uniformly’ irrespective of gender, religion, class and other morphological features seen in humans.⁴⁷⁴ Implement therefore the equality of opportunities to achieve equal outcomes (results).⁴⁷⁵ The existence of disparities in societies is a manifestation of existence of a system or structural of discrimination which is the result of certain practices.⁴⁷⁶ To achieve equality of results, ‘unmanageable’ and ‘open-ended methods’ like quotas, for example, are advanced.⁴⁷⁷

However, quotas in employment recruitment can contribute to hostilities and resentment between social groups since they do not account for the individual choice, etc.⁴⁷⁸ Quotas disregard factors like seniority, competence and capacity.⁴⁷⁹ They should therefore be discouraged altogether or be used as a last resort.

The justification of refugees’ right to work is thus self-evident. What work is and how it contributes to the survival of an individual and society at large is also indisputable. The contrary is also true. When authorities fail to fulfil their legal obligations by, for example, paying less attention to respecting the right to work of the most vulnerable members of society, such as refugees, the Gap becomes inevitable. Partial respect of the right to work, for instance whereby refugees occupy precarious jobs in informal sectors, part-time work or other insecure positions,

⁴⁷⁴ Ibid para 35.

⁴⁷⁵ Ibid.

⁴⁷⁶ UN, Economic and Social Council, *Prevention of Discrimination: The Concept and Practice of Affirmative Action* (Final report submitted by Mr. Marc Bossuyt, Special Rapporteur, in accordance with Sub-Commission resolution 1998/5, 17 June 2002, E/CN.4/Sub.2/2002/21) para 35.

⁴⁷⁷ Ibid para 36.

⁴⁷⁸ Ibid.

⁴⁷⁹ Ibid 44.

makes it difficult for them to escape the Gap, however resilient they are. The following sections explores further justifications of the right to work.

3.2.4 Respect for dignity and self-esteem

Work is inextricably connected to the principle of dignity, based on how one is treated by others and how one regards oneself.⁴⁸⁰ Human beings are ‘born free and equal in dignity and rights’,⁴⁸¹ and should be treated with equal concern and respect, including the provision of ‘decent’ work.⁴⁸² International human rights jurisprudence recognizes the important values and interests which individuals derive from work, which must be protected and fulfilled by States and private individuals. One of these values is dignity, which can be equated to ‘self-respect’ or ‘self-esteem’, carrying the sense of how one is treated by others and how one regards oneself: it is often derived from work.⁴⁸³ Exclusion from the labour market, in addition, subjects individuals to a ‘humiliating trilemma of starvation, a life of crime, or dependence’ on welfare benefits or charity.⁴⁸⁴ Unemployed people risk the loss of self-esteem, and their rights are denied when their employment opportunities are restricted or when they are treated with less than equal concern and respect.⁴⁸⁵ Self-esteem can even be derived from dull and routine work. As long as the work produces goods and services that have value and therefore can be purchased, it is not futile.⁴⁸⁶

⁴⁸⁰ C Hugh, ‘Is There a Human Right to Work?’ In V Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart Publishing 2015)17-38, 29.

⁴⁸¹ UDHR art 1.

⁴⁸² CESCR, *General Comment Number 18* para 7; The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights, UN Doc. E/C.12/GC/18, Geneva (2005) art 6.

⁴⁸³ C Hugh, *ibid* (n 480), 29. See also summary of Committee on Migration, Refugees and Displaced Persons, Council of Europe Parliamentary Assembly, *Refugees, and the Right to Work* (Report/Doc. 13462, Rapporteur Mr. Christopher CHOPE 24 March 2014).

⁴⁸⁴ J Nickel, ‘Is There a Human Right to Employment? (1978-79) X Philosophical Forum 149’ in V Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart Publishing 2015) 28.

⁴⁸⁵ *Ibid* 29.

⁴⁸⁶ J Else, ‘Is There (or Should There Be) A Right to Work?’ in A Gutman (ed), *Democracy and the Welfare State* (Princeton University Press, Princeton 1988) 83 cited in V Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart Publishing 2015) 30.

3.2.5 Self-realization and sense of achievement

Self-realization is another value derived from work that is protected by international human rights law. Although ‘both mice and men need food and shelter’ if they are to survive, and both work tirelessly ‘to scabble a living out of the available resources and opportunities’, the additional reason given by humans to work is self-realization or self-actualization.⁴⁸⁷ Work gives meaning or personal fulfilment to individuals’ lives. Self-realization can be achieved by use of individuals’ ‘physical strength’ and ‘capacities of thought’ to create something of one’s own, and this is what distinguishes men from mice.⁴⁸⁸ Self-realization and human motivation have close affinity: ‘other things being equal, human beings enjoy the exercise of their realised capacities (their innate or trained abilities), and this enjoyment increases the more the capacity is realised, or the greater its complexity’.⁴⁸⁹ A sense of achievement is experienced in a job well done, when individuals use their skills in co-operation with others or individually to achieve a certain goal; they can identify themselves with or can be identified by the product of their ‘painful’ effort even in boring and monotonous jobs.⁴⁹⁰ When physical and intellectual abilities are tested through work, having a job for its own sake justifies the right to work, although the material benefits seem more significant.

3.2.6 Financial independence, social inclusion and trauma reduction

Including and integrating refugees economically through the labour market leads to their financial independence.⁴⁹¹ Access to work could be the most important avenue to inclusion and integration because it reduces the costs of providing social assistance to refugees by States, and creates a more cohesive society.⁴⁹² The justification of the right to work is rooted in the reality that for individuals to be socially included, to truly participate and have a stake in their society,

⁴⁸⁷ Ibid 32.

⁴⁸⁸ Ibid 33.

⁴⁸⁹ J Rawls, ‘A Theory of Justice’ in V Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart Publishing 2015) 34.

⁴⁹⁰ Ibid 34-5.

⁴⁹¹ The Michigan Guidelines ibid 293.

⁴⁹² Committee on Migration, Refugees and Displaced Persons, Council of Europe Parliamentary Assembly, *Refugees and the Right to Work* (Report/Doc.13462, Rapporteur Mr. Christopher CHOPE 24 March 2014).

access to work is an avenue that cannot be left to the *laissez-faire* labour market. One significant aspect of the right to work is that the unemployed individuals owe a duty to society, but under the Gap they are defeated as their personal and material well-being dissipate.⁴⁹³ Society, however poor, opulent or frugal is, should progressively throw out a lifeline to its sinking members. ‘A situation where not everyone is able to invest oneself according to one’s capacity and for the common good is a situation that is in no one’s interest’, it has been observed.⁴⁹⁴ Finally, if refugees are employed, they can recover more quickly from the ‘traumatic’ situations that preceded their departure.⁴⁹⁵

3.2.7 Social justice argument

Justice means preventative as well as remedial legal protection.⁴⁹⁶ Justice enables decision-making which is based on rights set out in binding and clear ways, and in the case of infringements, offers a means of rectification through jurisdiction, and the possibility of appeal. Because of the principle of social justice, refugees living under the Gap should be in position to invoke principles derived from international human rights laws and domestic legislation to get protection from unemployment. The idea of social justice includes, *inter alia*, freedom, stability and social safety. This means that basic freedoms, together with the social safety of citizens, are simultaneously achieved, in addition to progress without eliminating stability.⁴⁹⁷ The right to work can be understood as a right that protects an individual’s access to work. Without work and its products, societies can barely exist. The underlying principle should be that every person should obtain his or her living by work, except in demonstrable evidences of physical and mental incapacities. Work not only generates material goods and services which every individual needs for survival, but also delivers income, a sense of self-esteem or achievement and a sense of

⁴⁹³ Paz-Fuchs *ibid* 181.

⁴⁹⁴ M Mikkola, *Social Human Rights of Europe* (Karelactio 2010) 16.

⁴⁹⁵ Committee on Migration, Refugees and Displaced Persons, Council of Europe Parliamentary Assembly, *Refugees, and the Right to Work* (Rapporteur Mr. Christopher CHOPE, Report/Doc 13462, 24 March 2014).

⁴⁹⁶ *Ibid* 17-18.

⁴⁹⁷ *Ibid* 17.

belonging to society, and builds social relationships, *inter alia*.⁴⁹⁸ Other values of work achieved individually or collectively include dignity, autonomy and respect for life.⁴⁹⁹ Justice and fairness may be lacking if refugees burdened by the Gap cannot get remedial services, say, from courts.

3.3 Compromising the right to work

3.3.1 Ideological difficulties

In democratic and economically advanced economies such as the Nordics, the main challenge to respect of the right to work is not lack of practical, moral or philosophical justification of the principle. It is not even lack of employment opportunities *per se*, as the general unemployment rate is generally in single digits. For example, from 2000 to 2015, the overall unemployment rate stood at between five and eight per cent.⁵⁰⁰ However, the right to work can still be regarded as ideologically driven, because it creates positive obligations for States to intervene, may undermine the enjoyment of individual freedom and distorts the functions of the free market.⁵⁰¹ Such a criticism cannot be backed by modern human rights normative expectations.

Refugees are not inclined to any particular ideology as the majority are seeking protection from persecution. Individual freedom is better enjoyed if a person enjoys other freedoms, such as being able to contribute to society through employment. Lastly, the extent to which the Nordics labour markets are ‘free’ (fully competitive) is hard to ascertain. With strong trade unions that intervene on behalf of existing workers through for example, collective wage agreements, block hiring of new employees, etc., it is hard to conclude with certainty that the *laissez-faire* principle does operate. Given the significance of the right to work as an important

⁴⁹⁸ V Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart Publishing 2015) 1; CESCR, *General Comment Number 18: Interpretation of Article 6 of ICESCR* (adopted 24 November 2005 E/C.12/GC/186)

⁴⁹⁹ Hugh, ‘Is There a Human Right to Work?’ in V Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart Publishing, 2015)17-38, 28.

⁵⁰⁰ Nordic Council of Ministers, *Nordic Statistics 2016*, 17 <<https://norden.diva-portal.org/smash/get/diva2:1040725/FULLTEXT03.pdf> > accessed 09 August 2017.

⁵⁰¹ E Krause and A Rosas, ‘Economic, Social and Cultural Rights as Legal Rights: A Universal Challenge’ in A Eide, C Krause and A Rosas (eds), *Economic Social, and Cultural Rights: A Textbook* (Dordrecht, Martinus Nijhoff 1995).

international human rights principle, and the social consequences of ignoring it, States must intervene positively so that social justice is realized.

3.3.2 Free labour market imperfections

There are numerous examples of how the right to work is compromised. For example, high or long-term unemployment and the lack of secure employment may work in conjunction with other free labour market imperfections, such as discrimination against certain populations, to violate the right to work of refugees, the most vulnerable groups in the Nordics. Other vulnerable groups include women,⁵⁰² older people,⁵⁰³ migrant workers and all members of their family,⁵⁰⁴ young people entering the labour market for the first time without work experience,⁵⁰⁵ people with disabilities,⁵⁰⁶ etc. People in such circumstances can be induced to seek work in informal sectors of the economy that typically lack protection. Under casual and zero hours contracts, for instance, the employer unilaterally determines when work is required and the employee is paid only for those hours actually worked.⁵⁰⁷ Most refugees, just like other vulnerable groups in the Nordic society, usually find themselves stranded in the Gap because of a lack of employment opportunities, or over-represented in precarious jobs with poor terms.

An employee who is always ‘on call’ but paid only for the work performed is kept waiting and not earning money during that period.⁵⁰⁸ They and their direct dependents suffer poverty (monetary and material) because their earnings are lower than if the employment was full-time or constantly available. Under casual and zero hours contracts, employers can easily adjust their labour costs and pass the risk of a lack of work onto their employees.⁵⁰⁹ Under such circumstances, employees cannot make concrete plans for their lives or those of their

⁵⁰² CESCR, *General Comment Number 18*, para 13.

⁵⁰³ *Ibid* para 16.

⁵⁰⁴ *Ibid* para 18.

⁵⁰⁵ *Ibid* para 14.

⁵⁰⁶ *Ibid* para 17.

⁵⁰⁷ Hugh, ‘Progress towards the Right to Work in the United Kingdom’ in V Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (2015) 227-54, 236.

⁵⁰⁸ *Ibid*.

⁵⁰⁹ *Ibid* 237.

dependents. Except under certain circumstances, where an employee decides to work less due to, for example, ill-health, flexible jobs like temporary, casual and labour pool work, etc. frequently represent a violation of the right to work because they are designed, to a large extent, to benefit employers and not the workers.

3.3.3 Equality and non-discrimination

In democratic and economically advanced countries like the Nordics, the practical, moral and philosophical justifications for the right to work are not lacking.⁵¹⁰ As noted, overall unemployment rates are generally low, but for refugees, the percentage is, conservatively, three times higher.⁵¹¹ The long-term unemployment rates for most vulnerable groups like refugees is always in double figures. There are many plausible reasons for this but discrimination against non-Europeans on the grounds of ethnicity, religion, etc., could be taking its toll. In such circumstances, the principles of equality and non-discrimination, principles so fundamental in international human rights law, are tested. Non-discrimination as a principle, for instance, is an *ius cogens* in many international and European jurisdictions.⁵¹² States are obliged to secure respect for non-toleration of discriminatory situations and for protection of human rights without discrimination. Although international human rights law emanates from human conscience, it is nonetheless a reflection of objective justice, embodies superior values, and rescues vulnerable groups from state voluntarism and unilateralism.⁵¹³

States are justified in taking affirmative action purposely to eliminate or diminish conditions that perpetuate discrimination.⁵¹⁴ International human rights law obligates States to prevent discrimination even before it is detected. This is because all human beings are born equal

⁵¹⁰ Except for Sweden, all the Nordic constitutions contain a paragraph on the right to work. Sweden, on the other hand, is bound by the Revised European Social Charter, Article 1 which specifies that the right to work is fundamental, and must be protected by law.

⁵¹¹ O Stokke and S Gedde-Dahl, '20 år. 23 handlingsplaner. 672 tiltak. Men fortsatt er arbeidsledigheten blant innvandrere tre ganger så høy' Aftenposten (24 November 2012). ('20 years, 23 action plans, and 627 measures: but unemployment among immigrants is still three times so high).

⁵¹² Inter-American Court of Human Rights (IACtHR), Advisory Opinion Number 18 (2003) in Y Haeck *et al.* (eds), *Human Realisation of Human Rights: When Theory Meets Practice. Studies in Honour of Leo Zwaak* (2013) 25.

⁵¹³ AAC Trindade, 'International Law for Humankind – Towards a New Jus Gentium' in Y Haeck *et al.* (eds), *Human Realisation of Human Rights: When Theory Meets Practice. Studies in Honour of Leo Zwaak* (Intersentia 2013) 24.

⁵¹⁴ CESCR, *General Comment Number 18*, para 12 (b) (i). See also M Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008) 24.

in dignity, and should therefore be treated with equal concern. Giving everyone equal access to opportunities without discrimination, as justice and fairness require, can lead to equality of outcomes.⁵¹⁵ Although the European Convention on Human Rights (ECHR), which covers the Nordics, contains no provision of the right to work, excluding an applicant from seeking jobs even in the private sector can be tantamount to a violation of Article 8 protecting their individual rights.⁵¹⁶ As has been noted, ‘it is, after all, in the course of their working lives that the majority of people have significant, if not the greatest, opportunity of developing relationships with the outside world’.⁵¹⁷

Furthermore, the European Court of Human Rights (ECtHR) has confirmed in two cases that access to work is a right to be protected.⁵¹⁸ In the first case, ie *Sidabras and Džiautas v. Lithuania*, the European Court of Human rights, ruled that a violation of Article 14 of the European Convention on Human Rights (ECHR) (prohibition of discrimination), taken in conjunction with Article 8 (respect for private life), had occurred. Both applicants had been dismissed from their new jobs and their future employment opportunities thwarted because they had the status of ‘former KGB officers’, something that meant restriction of their employment rights. In the second case, ie *Thlimmenos v. Greece*, a member of the Jehovah’s Witnesses had been excluded from seeking a job as an accountant because he had previously been convicted of insubordination for refusing to wear a military uniform at a time of general mobilization. The Court ruled that Article 14 of the ECHR taken in conjunction with Article 9 (freedom of thought, conscience and religion) of the same Convention, had been violated. Still, cases about unfair dismissals and protection of wages (salaries) and other forms of payment can be lodged and claimed successfully.⁵¹⁹

However, if such anti-discrimination laws were to be employed to protect refugees under the Gap, they would have to take a different form from the one they have today. The right to

⁵¹⁵ A Clapham, *Human Rights: A Very Short Introduction* (OUP 2007), 143.

⁵¹⁶ IE Koch, ‘The European Convention on Human Rights and the Protection of Socio-Economic Demands’ in A Mihr and M Gibney, *The SAGE Handbook of Human Rights* (SAGE Publication 2014) 673.

⁵¹⁷ *Case of Niemietz v Germany*, App No. 13710/88 (ECtHR, 16 December 1992 para 29).

⁵¹⁸ Cases of *Sidabras and Džiautas v. Lithuania*, App No. 55480/00 and 59330/00 (ECtHR, 27 July 2004); *Thlimmenos v. Greece*, App No. 34369/97 (ECtHR, 12 January 1998).

⁵¹⁹ For case law, see A Mihr and M Gibney, *The SAGE Handbook of Human Rights Vol 2* (SAGE Publications 2014) 689.

work can be loose in scope, content, and moral and legal obligations. That is why States and employers can find ways of circumventing and circumscribing it. Much as the right to work is legally binding in international human rights law, the word ‘work’ itself needs further analysis. In international human rights law, work is a ‘complex normative aggregate’; roughly understood as provision of a service for and under the direction of another in return for remuneration.⁵²⁰ A closer study of how work came to occupy Article 23 of the UDHR can shed light on its importance.

3.4 Origin of the right to work

The precise origin of the concept of right to work as it currently stands in international human rights law is somewhat obscure. However, the ‘mother’, the progenitor of social human rights that led to the international adoption of the ICESCR and its later Optional Protocol⁵²¹ and in Europe, the European Social Charter of 1961,⁵²² is the International Labour Organization (ILO), formed in 1919.⁵²³ In its preamble, it set out to improve unjust working conditions, hardships and privation, which produced unrest that threatened the peace and harmony of the world. These poor conditions were caused by several factors, one of them being unemployment. According to Albert Thomas, the first Director-General of the ILO, tension ‘within’ and ‘between’ nations would be minimized if workers were provided with daily stability and security against the threat of war after the experience of the First World War.⁵²⁴

In its preamble, the ILO noted that universal and lasting peace could be established only if it was based upon social justice. Historically, the causes of social upheavals have been demonstrated to be products of, and to a greater extent the result of neglect of, the expectations of sections of vulnerable groups: for example, young adults without experience of work. Greater resources are thus taken away from production and welfare, and are diverted to law enforcement

⁵²⁰ RKM Smith, *Textbook on International Human Rights* (5th edn OUP 2012) 314.

⁵²¹ Under the Optional Protocol, individuals and groups can complain violation of their rights as provided by ICESCR.

⁵²² Art 1-10

⁵²³ M Mikkola, *Social Human Rights of Europe* (Karelactio 2010) 48.

⁵²⁴ S Hughes and N Haworth, *The International Labour Organisation (ILO): Coming from the Cold* (Routledge 2011) 7. See also N Bernaz, *Business and Human Rights: History, Law, and Policy - Bridging the Accountability Gap* (Routledge 2017).

to safeguard social stability. Promoting workers' needs can be equated to provision of social justice.⁵²⁵ The ILO, whose philosophy is closely followed by trade unions, is now a tripartite decision-making organization involving governments, employers and trade unions, at least in the context of the Nordics.⁵²⁶

3.4.1 The drafting of the UDHR and the right to work

The Universal Declaration of Human Rights (UDHR) was the first internationally agreed source of the right to work.⁵²⁷ It was the first truly international document that transcended all ideologies and propounded a holistic approach to and integration of human rights.⁵²⁸ During its drafting from 1945-48, Cuba may have been the first country to present a proposal similar to the current Article 23 on the right to work, proposing a draft declaration⁵²⁹ which defined a person's right to work as: 'The right to work under conditions fitting to his status as a human being and to receive, in return, a remuneration in proportion to the value of his contribution to the community'. The Union of Soviet Socialist Republics (USSR) representative⁵³⁰ noted that the right to work was one of the fundamental rights in the Russian Constitution (Article 118) and 'violation against the observance of human rights was punishable by law'.⁵³¹

⁵²⁵ Ibid 16.

⁵²⁶ S Hughes and N Haworth, *The International Labour Organisation (ILO): Coming from the Cold* (Routledge 2011) 5.

⁵²⁷ Art 23.

⁵²⁸ AAC Trindale, 'The International Law of Human Rights Two Decades After the Second World Conference on Human Rights in Vienna in 1993' in Haeck, Leyh, Burbano-Herrera and Contreras-Garduno (eds), *Human Realisation of Human Rights: When Theory Meets Practice. Studies in Honour of Leo Zwaak* (Intersentia 2014) 16.

⁵²⁹ The Cuban Delegation to the General Assembly of the United Nations, 12 February 1946, E/HR/1 in WA Schabas (ed), *The Universal Declaration of Human Rights: The Travaux Préparatoires, Vol I: October 1946 to November 1947* (CUP 2013) 17.

⁵³⁰ Mr. Feonov.

⁵³¹ Summary Record of the Fifth Meeting, Second Session [of the Economic and Social Council] (E/SR.19, 31 May 1946) *ibid* 60.

By January 1947, the Division of Human Rights was ready to compare the different texts from different proposals,⁵³² which variously considered work as a right or a duty, and conditions at places of work. In December 1947, the United States of America added its ‘short form’ (US IX) proposal that read, in part: ‘Everyone has the right to a decent living; to work and advance his wellbeing...’ The text differed from that of the Human Rights Drafting Committee which read: ‘DC 16. There shall be equal opportunity for all to engage in all vocations and professions not constituting public employment’.⁵³³

In the draft declaration,⁵³⁴ Article 29 was very similar to the final Article 23, reading: ‘Everyone has the right to work. The State has a duty to take such measures as may be within its power to ensure that all persons ordinarily resident in its territory have an opportunity for useful work. The State is bound to take all necessary steps to prevent unemployment’. The discussion continued with comments on specific articles, with Article 29 setting out the right to work and the duty to take measures to ensure that citizens are provided with useful work.⁵³⁵

3.4.2 Sharp disagreements

Different delegates and committee members had strongly divergent views on the wording of the text. The representative of the United Kingdom, for instance, wanted the article to read: ‘Everyone has the right to work or to maintenance’.⁵³⁶ The United States of America representative was concerned with ‘setting forth positive duties of States’ in such an article because it would ‘throw the rest of the Declaration out of balance’.⁵³⁷ The representative of the Byelorussian Soviet Socialist Republic, on the other hand, wanted the following clause: ‘The

⁵³² Textual Comparison of the Proposed Drafts of an International Bill of Human Rights, E/CN.4/W.8, 20 January 1947. The drafts were submitted by Delegation of Panama (prepared by the American Law Institute, E/HR/3), the Delegation of Cuba (E/HR/1), the Delegation of Chile (prepared by the Inter-American Juridical Committee, E/CN.4/2) and the American Federation of Labor (E/TC.2/2), WA Schabas (ed), *The Universal Declaration of Human Rights: The Travaux Préparatoires, Vol II, December 1947 to August 1948* (CUP 2013) 137.

⁵³³ Parallel Passages in Human Rights Drafting Committee Text and United States Proposal (E/CN.4/36/Add.2, 5 December 1947) *ibid* 1147.

⁵³⁴ E/CN.4/77/Annex A (16 December 1947) *ibid* 1330.

⁵³⁵ Comment on the Draft International Declaration on Human Rights, E/600 *ibid* 1330.

⁵³⁶ Comments on Specific Articles of the Draft Declaration, E/600 *ibid* 1353.

⁵³⁷ *Ibid* 1353.

State is obliged to take all necessary measures against unemployment'.⁵³⁸ The Government of Mexico wanted it phrased: 'Everyone has the right to paid work'.⁵³⁹ Brazil, like the United States of America, did not want to mention the 'positive duties of the State' but said the Byelorussian proposal that 'the State is obliged to take all necessary measures against unemployment', would be acceptable.⁵⁴⁰

3.4.3 More chasms

South Africa, meanwhile, preferred deletion of the second and third clauses of Article 23, arguing they did not, *per se*, 'constitute human rights or freedoms, but duties of the State concerning which a separate convention or declaration is being considered'.⁵⁴¹ The Government went on to argue against all economic rights like the right to work and to do useful work, the right to leisure, the right to remuneration commensurate with ability, the right of women to equal pay for equal work, the right to social security, and more.⁵⁴² Fulfilling such rights would require action from States as well as private employers, which would mean resorting to 'totalitarian control of the economic life of the country', and the Government did not like it.⁵⁴³ The right to work was further described as being presented in 'general terms the duties of States rather than the specific rights and freedoms of individuals'.⁵⁴⁴

⁵³⁸ Ibid.

⁵³⁹ Comments from Governments on the Draft International Declaration of Human Rights, Draft International Covenant on Human Rights and the Question of Implementation, Communication from Mexico (Ministry of Foreign Affairs) (E/CN.4/82/Add.1, 16 April 1948) WA Schabas *ibid* 1417.

⁵⁴⁰ Comments from Governments on the Draft International Declaration of Human Rights, Draft International Covenant on Human Rights and the Question of Implementation, Communication Received from Brazil, (E/CN.4/82/Add.2, 22 April 1948) *ibid* 1430.

⁵⁴¹ Comments from Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights, and the Question of Implementation (E/CN.4/82/Add.4, 27 April 1948) *ibid* 1435.

⁵⁴² Ibid.

⁵⁴³ Ibid.

⁵⁴⁴ Collation of the Comments of Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights, and the Question of Implementation (E/CN.4/85, 1 May 1948) in WA Schabas *ibid* 1450.

Mexico, on the other hand, still wanted the text in paragraph 1 of Article 23 drafted as ‘Everyone has the right to paid work’.⁵⁴⁵ Brazil supported the view of the United States of America Representative of not mentioning positive duty of the State but still agreed with the suggestion of Byelorussia: ‘The State is obliged to take all necessary measures against unemployment’.⁵⁴⁶ The Union of South Africa still insisted on the deletion of the second and the third clauses as they were going to appear in a separate convention or declaration.⁵⁴⁷ Egypt, on the other hand, suggested: ‘The duty incumbent on the State under the provisions of Article 23 is a positive one;’ and the State ‘should do everything possible to organise its domestic economy in such a way as to give all persons ordinarily resident in its territory an opportunity for useful work’.⁵⁴⁸ The battle was not over. Some drafters still insisted on their earlier proposals while others made minor amendments.

3.4.4 New suggestions

The Chinese delegation submitted a comment where the right to work was organized under Article III,⁵⁴⁹ grouped under the right to a decent living, work and leisure, health, education, economic and social security.⁵⁵⁰ The United States of America did not agree. It recommended that Article 23 should read...Everyone is entitled to: The right to work under fair and just conditions, to choose a vocation freely, and to join trade unions of his own choice for the protection of his interests in securing a fair standard of living for himself and his life’.⁵⁵¹ The French offered perhaps the most detailed suggestions, where, *inter alia*, everyone had the right to work; the State had a duty to prevent unemployment; pay was to be commensurate with ability and skill for securing a full, decent and dignified life; and women were to receive equal pay for

⁵⁴⁵ Collation of the Comments of Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights, and the Question of Implementation (E/CN.4/85, 1 May 1948) in WA Schabas *ibid* 1468.

⁵⁴⁶ *Ibid* 1468.

⁵⁴⁷ *Ibid* 1468.

⁵⁴⁸ *Ibid* 1468.

⁵⁴⁹ Draft International Declaration on Human Rights (E/CN.4/AC.1/18, 3 May 1948) *ibid* 1476.

⁵⁵⁰ *Ibid* 1476.

⁵⁵¹ Draft International Declaration on Human Rights (Document E/600) with United States’ Recommendation (E/CN.4/AC.1/20, 5 May 1948) *ibid* 1498.

equal work and with the advantages as men.⁵⁵² The United Kingdom, however, wanted Article 23, Sub-paragraph 1, redrafted to read: ‘Everyone has the right to work or maintenance’.⁵⁵³ The new recommendations, it seems, were now a mixture of rights and equality issues.

However, the wording of the draft, especially the Article on the right to work, was severely criticized by the Union of Soviet Socialist Republics’ AN Pavlov,⁵⁵⁴ who argued that the draft did ‘not really give the working man any real guarantee against unemployment’.⁵⁵⁵ The Article was described as indefinite, vague and ambiguous, and incapable of doing ‘anything really significant to the unemployed person’.⁵⁵⁶ He even recalled Article 118 of the constitution of the Soviet Union, saying that in the ‘Soviet Union, the right to work is a complete reality’.⁵⁵⁷ He therefore wanted concrete ways and means that would give effect to rights rather than the ‘empty definitions’ which he said the Declaration was contented with.⁵⁵⁸ Despite the criticisms, the Drafting Committee,⁵⁵⁹ during the second session, considered a draft of Article 23 as follows:

1. Everyone has the right to work.
2. The State has a duty to take such measures as may be within its power to ensure that all persons ordinary resident in its territory have an opportunity for useful work.
3. The State is bound to take all necessary steps to prevent unemployment.

⁵⁵² Observations of Governments on the Draft International Declaration on Human Rights, the Draft International Covenant on Human Rights, and Methods of Application, Communications from the French Government, (E/CN.4/82/Add.8, 6 May 1948), Comments on the Articles of the Draft International Declaration on Human Rights (E/CN.4/85, 1 May 1948) in WA Schabas *ibid* 1506.

⁵⁵³ Comments from Governments on the draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the Question of Implementation, Communication Received from the United Kingdom (E/CN.4/82/Add.9, 10 May 1948), Comments on the Articles of the Draft International Declaration on Human Rights (E/CN.4/85, 1 May 1948) *ibid* 1516.

⁵⁵⁴ Speech by Mr. A.N. Pavlov, Representative of the Union of Soviet Socialist Republics in the Drafting Committee of the Commission on Human Rights (E/CN.4/AC.1/29, 11 May 1948) *ibid* 1523.

⁵⁵⁵ *Ibid*.

⁵⁵⁶ *Ibid* 1523.

⁵⁵⁷ *Ibid* 1524.

⁵⁵⁸ *Ibid* 1527.

⁵⁵⁹ Report of the Drafting Committee to the Commission on Human Rights (E/CN.4/95, 21 May 1948) in WA Schabas *ibid* 1611.

The alternative text suggested by France and the United Kingdom for Articles 23 and 24 was also considered.⁵⁶⁰ The committee also had to consider amendments suggested by India and the United Kingdom,⁵⁶¹ who suggested omitting the second and third sentences and replacing the first with: ‘Everyone has the right to work under just and favourable conditions’.⁵⁶² China suggested that Articles 23, 24, 25, 26, 27, 28 and 29 of the draft be substituted by: ‘Everyone has the right to a decent living; to work and leisure, to health, education, economic and social security’.⁵⁶³ As the discussions progressed, Articles 23 and 24 were merged and discussed in detail, as they had become virtually inseparable ideas covering: i) the right to work; ii) the right to just and favourable working conditions; iii) the right to a decent standard of living for the worker and his family; iv) equal working conditions for men and women workers, v) the right to join a trade union; and vi) the right to fight unemployment.⁵⁶⁴

The Ukrainian Soviet Socialist Republic representative, Mr. Klekovkin, argued that very few documents at the time that contained the right to work, leisure, etc. Work and unemployment were two problems which, if glossed over, ‘would mean disregarding one of the main anxieties of the man in the street’.⁵⁶⁵ It was for the State to take the necessary measures on behalf of the community or society to prevent unemployment. Mr. Klekovkin noted further that ‘work was not a painful obligation, but a mutual emulation whereby each wanted to outdo his neighbour, which can result in constructive and progressive character of the concept of work’.⁵⁶⁶

The debate was not over. The Philippines delegation noted that it would be wise to avoid excessive reference to the duties of the State.⁵⁶⁷ A new paragraph was suggested for insertion into Article 23: ‘The enjoyment of those rights should be ensured by such measures as would

⁵⁶⁰ Ibid 1611.

⁵⁶¹ India and the United Kingdom: Proposed Amendments to the Draft Declaration on Human Rights (E/CN.4/99, 24 May 1948) in WA Schabas *ibid* 1622.

⁵⁶² Ibid 1622.

⁵⁶³ China: Amendment to the Draft International Declaration on Human Rights (E/CN.4/102, 27 May 1948) *ibid* 1653.

⁵⁶⁴ Summary Record of the Sixty-Fourth Meeting [of the Commission on Human Rights] (E/CN.4/SR.64, 17 June 1948) (meeting took place on 8 June 1948) *ibid* 1802-03.

⁵⁶⁵ Ibid 1803

⁵⁶⁶ Ibid 1804.

⁵⁶⁷ Ibid 1808.

create the possibility for useful work and prevent unemployment'.⁵⁶⁸ The Australian representative, however, suggested replacing Articles 23, 24 and 25 as follows: 'Everyone has the right to useful and remunerative work', 'Everyone has the right to just and fair working conditions and to reasonable limitations on working hours', and 'Everyone is free to join trade unions for the protection of his interests'.⁵⁶⁹

The representative of the International Federation of Christian Trade Unions argued that, as the rights were newly recognized, it was necessary to express them explicitly.⁵⁷⁰ The right to work was the first of the eight rights to be identified. Mr. Charles Habib Malik, a Rapporteur, noted the need to insert a statement calling for 'attention to the need for establishing the kind of economic and social conditions that would guarantee those rights'.⁵⁷¹ The next draft⁵⁷² used the wording: 'Everyone has the right to work and to just and favourable conditions of work and pay'. The State or society was tasked with creating possible opportunities (favourable conditions) and preventing unemployment; everyone had the freedom to join trade unions to protect his or her interests, with equal pay for equal work by men and women.

3.4.5 The 65th and 66th meetings

It was proposed that States' obligations would be inserted either in the preamble or in the text preceding the enumeration of economic and social rights.⁵⁷³ The debate on Article 23 continued as noted in the summary records of the 65th meeting⁵⁷⁴ and 66th meeting.⁵⁷⁵ The right to work appeared in the text of the American Declaration of the Rights and Duties of Man,

⁵⁶⁸ Ibid 1808.

⁵⁶⁹ Ibid 1808.

⁵⁷⁰ Ibid 1808.

⁵⁷¹ Ibid 1809.

⁵⁷² Report of the Sub-Committee Consisting of the Representatives of Australia, France, India, Philippines, Union of Soviet Socialist Republic, United Kingdom, and the United States on Article 23 of the Declaration on Human Rights, (E/CN.4/114, 9 June 1948) in WA Schabas *ibid* (Vol II December 1947 to August 1948) 1809.

⁵⁷³ Ibid 1810.

⁵⁷⁴ Commission on Human Rights (E/CN.4/SR.65, 9 June 1948), Continuation of the Discussion of the Draft Declaration of Human Rights, Document E/CN.4/95 in WA Schabas *ibid* 1810-11.

⁵⁷⁵ Commission on Human Rights (E/CN.4/SR.66, 9 June 1948) in WA Schabas *ibid* 1817.

Article XIV, XV and Article XXXCII (duty to work).⁵⁷⁶ In the next discussion, the right to work appeared in the draft as Article 21 and contained three paragraphs covering the right to work, the right to equal pay for equal work and freedom to join trade unions.⁵⁷⁷ The article remained unchanged in the report⁵⁷⁸ that followed, but the Union of Soviet Socialist Republics' delegation offered a statement proposing an amendment.⁵⁷⁹ The Canadian delegation, however, criticized Articles 20-22 of the draft as having gone beyond the purpose of the declaration to become 'a declaration of government responsibilities in the social field'.⁵⁸⁰ A further step was to find a way to harmonize the content of the draft human rights declaration and with the corresponding articles of the American declaration.⁵⁸¹

3.4.6 Cuban draft plan

By October 1948, Cuba had presented a draft plan of work, so that the Declaration was 'clearer, more precise and more easily accessible by all countries'.⁵⁸² The USSR, as seen in Document E/800, believed that economic, social and cultural rights (Articles 21-26) occupied special importance, and it was therefore a '... duty of the State and society to take all necessary measures, including legislative measures, to ensure for every individual a real opportunity to enjoy all the rights mentioned in the Declaration'.⁵⁸³ Article 21, the right to work, was adopted by the Commission on Human Rights⁵⁸⁴ but the USSR still wanted amendments, insisting that

⁵⁷⁶ Ninth International Conference of American States (E/CN.4/122) in WA Schabas *ibid* 1827-34.

⁵⁷⁷ Draft International Declaration of Human Rights (Draft United Nations Declaration of Human Rights, (E/CN.4/148/Add.1, 18 June 1948 Annex A) *ibid* 1944.

⁵⁷⁸ Report of the Third Session of the Commission on Human Rights, E/800, 28 June 1948.

⁵⁷⁹ Appendix, Statement Made by the Delegation of the Union of Soviet Socialist Republics, in the Commission on Human Rights on the Results of the Commissions Work, 18 June 1948, WA Schabas *ibid* 1980.

⁵⁸⁰ Report of the Third Session of the Commission on Human Rights, E/800, E/800/Corr.1, E/800/Add.1, E/AC.27/W.1, E/857 and E/1009, E/SR.215 *ibid* 2004.

⁵⁸¹ Colombia and Cuba: Table of Correlation of Articles of the Draft International Declaration of Human Rights and the American Declaration of the Rights and Duties of Man (E/800 and E/CN.4/122, A/C.3/214, 1 October 1948) in WA Schabas, *The Universal Declaration of Human Rights: The Travaux Préparatoires, Vol III September to December 1948* (CUP 2013) 2042-44.

⁵⁸² A/C.3/218, 4 October 1948 cited in WA Schabas *ibid* 2076-81.

⁵⁸³ Compilation of Amendments to the Draft Declaration of Human Rights Submitted to the Third Committee, (A/C.3/230, 6 October 1948) *ibid* 2124.

⁵⁸⁴ *Ibid*.

the State and society should ‘guarantee this right by measures calculated to provide everyone with the broadest of opportunities for useful work, and to prevent unemployment’.⁵⁸⁵

Furthermore, Cuba wanted Article 21 broken up so that the first paragraph read: ‘Every person has the right to work, under proper conditions, and to follow his vocation freely, in so far as existing conditions of employment permit’.⁵⁸⁶ This was followed by Argentina’s request to amend, *inter alia*, Article 21 so that Paragraph 2 was substituted with: ‘Every person has the right to a fair remuneration for the work which he performs on the basis of equal pay for equal work’.⁵⁸⁷ Sweden also wanted Article 21 amended to acknowledge that workers had natural liberty to abstain from work if they were not happy with the economic terms, suggesting the first paragraph should end with: ‘Everyone has the right to cease work, when finding it impossible to work on the economic terms existing or offered’.⁵⁸⁸

Lebanon, on the other hand, wanted Article 21 amended to add ‘and to a free choice work and of his mode of life’ to the words ‘everyone has the right to work’.⁵⁸⁹ Another proposed amendment came from New Zealand which wanted the right to belong to a trade unions to be included.⁵⁹⁰ Uruguay wanted a paragraph added to state that no one should be compelled to belong to a trade union.⁵⁹¹

In the text adopted by the Commission on Human Rights,⁵⁹² Article 21 was re-evaluated to reflect the views of the Union of Soviet Socialist Republics (E/800), United States of America (A/C.3/223), Cuba (A/C.3/232), Argentina (A/C.3/251), Sweden (A/C.3/252), Lebanon (A/C.3.260), New Zealand (A/C.3/267) and Uruguay (A/C.3/268). Sweden subsequently

⁵⁸⁵ Ibid 2124.

⁵⁸⁶ Cuba: Amendments to Articles 10 – 22 of the Draft Declaration (A/C.3/232, 7 October 1948) in WA Schabas *ibid* 2141.

⁵⁸⁷ Argentina: Amendments to Articles 20, 21, 22, 23 and 24 of the Draft Declaration (E/800) A/C.3/251.

⁵⁸⁸ Sweden: Amendments to Articles 16, 19 and 21 of the draft Declaration (E/800) (A/C.3/252 of 9 October 1948) in WA Schabas *ibid* 2167.

⁵⁸⁹ Lebanon: Amendments to Draft Declaration (E/800) (A.C.3/260, of 12 October 1948) *ibid* 2204.

⁵⁹⁰ New Zealand: Amendments to Preamble and Articles 10, 12, 20, 21, 22, 23 and 27 of the draft Declaration (E/800) (A/C.3/267, 12 October 1948) *ibid* 2210.

⁵⁹¹ Uruguay: Amendment to the Draft Declaration (E/800) (A.C.3/268, 12 October 1948) *ibid* 2213.

⁵⁹² Recapitulation of Amendments to Article 21 of the Draft Declaration (E/800) (A/C.3/298/Rev.1, 25 October 1948) but the actual date of issuance of A/C.3/298/Rev.1 was 30 October 1948 *ibid* 2328.

withdrew its amendment on the right to union membership, referring to the International Labour Organization as the appropriate body to handle such a question.⁵⁹³ The Union of Soviet Socialist Republics representative, Mr. Pavlov, said that unemployment was one of the greatest misfortunes of the working class and it was therefore prudent to compel States to take responsibility or measures to prevent unemployment.⁵⁹⁴

The Greek representative, Mr. Contoumas, noted that the right to free choice of work was already established in the Declaration of Philadelphia of the International Labour Organization;⁵⁹⁵ in his view, Article 21 ought to express the right in accordance with this declaration. Mr. de Athayde of Brazil was happy with the way the article on the right to work had been formulated, especially with regard to equal pay for equal work and freedom to join trade unions. However, he favoured the approach where ‘an individual’s work ought to conform to his aptitudes and productivity.’⁵⁹⁶ It was further noted that the rights in Article 21 were already included in the Constitution of Chile according to that country’s representative, Mr. Santa Cruz.⁵⁹⁷

Mr. Altman of Poland further argued that if States’ and society’s obligations regarding the right to work and protection against unemployment were omitted from Article 21, it would become meaningless and abstract.⁵⁹⁸ He further emphasized that States needed to ensure the ‘just and favourable conditions of work’ because accidents caused by poor working conditions were fairly common.⁵⁹⁹ He regretted the withdrawal of the Swedish amendment but said the right to strike was ‘of major importance’ and should be included in the declaration.⁶⁰⁰

⁵⁹³ Summary Record of the Hundred and Thirty-Ninth Meeting of the Third Committee (A/C.3/SR.139, 16 November 1948) in WA Schabas *ibid* 2600.

⁵⁹⁴ *Ibid* 2601.

⁵⁹⁵ *Ibid* 2603.

⁵⁹⁶ *Ibid* 2604.

⁵⁹⁷ *Ibid*.

⁵⁹⁸ *Ibid* 2605.

⁵⁹⁹ *Ibid*.

⁶⁰⁰ *Ibid*.

3.4.7 Work of the Third Committee

The draft version of Article 21 was further discussed by the Third Committee chaired by Mrs. Bodil Begtrup of Denmark.⁶⁰¹ The Ukrainian delegation believed the State was best equipped to protect workers, and including this as a State obligation would ensure the declaration achieved concrete results.⁶⁰² Equal pay for equal work especially between women and men or between racial groups was further emphasized. The right to belong to a trade union was also important because it was workers' 'only means of defending themselves'.⁶⁰³ Mrs. Corbet of the United Kingdom was confident that the draft of Article 21 was a 'clear statement of the objectives to be aimed at in the field of employment'.⁶⁰⁴ However, she said the Union of Soviet Socialist Republic's amendment differed from 'the essential character of the declaration' because it would 'oblige States to guarantee the right work',⁶⁰⁵ and implementing an 'all-embracing' right would be difficult to guarantee.⁶⁰⁶ The Union of Soviet Socialist Republics' amendment was consequently rejected as adding nothing new, since most of what it demanded was already in Articles 55 and 56 of the United Nations Charter, which the United Kingdom Government respected and was seeking to fulfil.⁶⁰⁷ The Lebanese amendments⁶⁰⁸ were viewed as having been based on a principle whereby an individual would engage in any work for which he was considered fit. The United Kingdom was obliged to vote against an amendment withdrawn by Sweden but re-introduced by Poland. The representative of the United Kingdom still rejected the Union of Soviet Socialist Republics' amendment to Paragraph 2, stressing the principle of equal pay for equal work, without distinction of race, nationality or sex, 'had no *raison d'être*'.⁶⁰⁹

Mr. Pavlov of the Union of Soviet Socialist Republics further stressed the importance of providing workers with a guarantee against unemployment, a principle considered vital. This was

⁶⁰¹ Summary Record of the Hundred and Fortieth Meeting of the Third Committee (A/C.3/SR.140, 16 November 1948) *ibid* 2607.

⁶⁰² *Ibid* 2608.

⁶⁰³ *Ibid*.

⁶⁰⁴ *Ibid* 2609.

⁶⁰⁵ *Ibid*.

⁶⁰⁶ *Ibid*.

⁶⁰⁷ *Ibid* 2609.

⁶⁰⁸ A/C.3/232/Corr.1 and A/C.3/251.

⁶⁰⁹ A/C.3/SR.140, 16 November 1948 *ibid* 2610.

further emphasized by Mr. Nosek of Czechoslovakia, who noted that the rights in Article 21 were already included in his country's constitution. Mr. Beaufort of the Netherlands noted that Article 21 dealt with the most important human rights, but rejected the Union of Soviet Socialist Republics' amendment because 'the rights of the State should not be laid down in the declaration'.⁶¹⁰ The French representative, Mr. Cassin, noted with satisfaction that the right to work had begun with the French Revolution in the declaration of 1789, continued with the Revolution of 1848, was crowned by the Constitution of 1946, and was now at the beginning of the article.⁶¹¹ After analyzing the Cuban, the Union of Soviet Socialist Republics, Argentine and other amendments, Mr. Cassin suggested adding 'best suited to his aptitudes and his vocation' to the words 'Everyone has the right to work'.⁶¹² By 16 November 1948, the draft of Article 21 read as follows:⁶¹³

- 1) Everyone has the right to work, to just and favourable conditions of work and pay and to protection against unemployment.
- 2) Everyone, without distinction as to race, nationality or sex, has the right to equal pay for equal work.

Every person who works has the right to receive such remuneration as will, in proportion to his capacity and skill, assure him a decent standard of living for himself and his family.

- 3) Everyone is free to form and to join trade unions for the protection of his interests.
- 4) Every person has the right to follow his vocation freely, in so far as existing conditions of employment permit.

In a meeting at the Palais de Chaillot, Paris,⁶¹⁴ members who had previously voted for and against Article 21 (E/800) were given an opportunity to explain their reasons. The Netherlands' representative had seen Paragraph 2 as unnecessary repetition of the ideas contained in Article 2 of the draft declaration, which could be dangerous and contradictory,⁶¹⁵ but the 'the right of

⁶¹⁰ A/C.3/SR.140 *ibid* 2615.

⁶¹¹ *Ibid*.

⁶¹² *Ibid* 2616.

⁶¹³ A/C.3/342 in WA Schabas *ibid* 2629.

⁶¹⁴ Summary Record of the Hundred and Forty-Second Meeting of the Third Committee (A/C.3/SR.142, 17 November 1948) (date of the meeting) *ibid* 2631.

⁶¹⁵ *Ibid* 2632.

equal pay for equal work' made some sense. The Ukrainian USSR representative had voted in favour because the rights expressed were basic to human life and any declaration devoid of the article would also be devoid of foundation and therefore meaningless.⁶¹⁶

The issue of non-discrimination remained contentious: Mr. Campos Ortiz of Mexico and Mr. Kural of Turkey rejected the phrase 'without distinction as to race, nationality or sex'. The debate continued to re-examine the text of the proposed article. Two amendments were adopted and the draft version of Article 21 became:⁶¹⁷

- 1) Everyone has the right to work, to just and favourable conditions of work and pay and to protection against employment.
- 2) Everyone has the right to equal pay for equal work.
- 3) Everyone is free to form and to join trade unions for the protection of his interests.

The seemingly 'controversial' proposals were amended, beginning with that of the Union of Soviet Socialist Republics.⁶¹⁸ Trade Unions, non-discrimination, and the right to follow one's vocation freely and the worker's remuneration became central in the discussion that followed. The new draft became:⁶¹⁹

- 1) Everyone has the right to work, *to free choice of employment*,⁶²⁰ to just and favourable conditions of work and pay and to protection against employment.
- 2) Everyone, *without discrimination*,⁶²¹ has the right to equal pay for equal work.
- 3) Everyone is free to form and to join trade unions for the protection of his interests.

Amending Paragraph 1 was not as hotly contested as Paragraph 2, the Union of Soviet Socialist Republics' non-discrimination clause. Despite the explanations put forward, discrimination on the grounds of race, nationality and sex was still rejected. As a compromise,

⁶¹⁶ Ibid.

⁶¹⁷ Report of Sub-Committee 3 of the Third Committee submitted by Dr. Guy Perez Cisneros (Cuba), Rapporteur (A/C.3/361, 22 November 1948) WA Schabas *ibid* 2729.

⁶¹⁸ Ibid 2729. See also the list of documents considered on page 2733 *ibid*.

⁶¹⁹ Ibid 2734.

⁶²⁰ Emphasis original.

⁶²¹ Emphasis original.

the text was changed to ‘Without distinction as to race, nationality, sex or religion’.⁶²² The Ecuadorian representative wanted ‘age’ added.⁶²³ The United States of America rejected the new amendment because it also contained a restrictive enumeration, ie it failed to include ‘political discrimination’.⁶²⁴ The United States of America proposed adding the words ‘without discrimination’ while Belgium proposed ‘without any discrimination’.⁶²⁵ For the Greek representative, ‘distinction’ could be substituted for ‘discrimination’, while the Lebanese representative preferred Article 21 without the word ‘discrimination’.⁶²⁶ The Lebanese amendment was rejected while that of Belgium was seconded by the United States of America and by a majority of States. The Sub-Committee had a new text: ‘Everyone, *without any discrimination*, has the right to equal pay for equal work’.⁶²⁷ The issues of remuneration and union membership were discussed and a new draft was produced.⁶²⁸ The discussion continued, as recorded in the report of Sub-Committee 3 in Document A/C.3/363.⁶²⁹ A clearer draft emerged in document A/C.3/367.⁶³⁰ A new draft text was in place by 29 November 1948⁶³¹ and this time the right to work, Article 21, had not changed.

3.4.8 Work of Sub-Committee 4

Many countries’ proposals for the draft did not mention ‘social rights’; but Cuba placed Article 21 under the heading of work alongside other social rights such as social security, rest,

⁶²² WA Schabas *ibid* 2735.

⁶²³ *Ibid*.

⁶²⁴ *Ibid*.

⁶²⁵ *Ibid*.

⁶²⁶ *Ibid*.

⁶²⁷ *Ibid* 2736.

⁶²⁸ Annex I *ibid* 2737 and Annex II, Draft Text for Article 21 Submitted by the Sub-Committee 3 to the Third Committee *ibid* 2738.

⁶²⁹ *Ibid* 2789-95, 2806-16.

⁶³⁰ Text of Article 21 of the Draft Declaration as adopted by the Committee (A/C.3/367, 25 November 1948) in WA Schabas *ibid* 2816-17.

⁶³¹ Text of Articles 1 to 28 of the Draft Declaration (E/800) and Text of an Additional Articles as adopted by the Third Committee, A/C.3/379 *ibid* 2884.

education and culture.⁶³² Cuba continued to present the proposed order of the draft declaration.⁶³³ Sub-Committee 4 worked on the draft, where Article 21 appeared with all three paragraphs (the rights to work, non-discrimination and trade union memberships),⁶³⁴ and adopted text that included four paragraphs of Article 21.⁶³⁵ However, in Annex A of the draft declaration, the text of the Third Committee was matched against the text of Sub-Committee 4.⁶³⁶ Article 21 was successfully adopted in the draft that followed.⁶³⁷ The right to work then became Article 24 in the 7 December 1948 draft.⁶³⁸ From that point on, the discussion mentioned the right to work, or work, generally as a subcategory of social rights.⁶³⁹ In the final resolution,⁶⁴⁰ however, the right to work found its final place as part of Paragraph 1, Article 23: ‘Everyone has the right to work...’ The Declaration created the obligation to protect citizens against unemployment, and the concept of progressive realization of such a right begun to take form. Positive duties were thus created.⁶⁴¹ After seeing how Article 23 of the UDHR took form and shape, this thesis now proceeds to discuss the different ways through which the right to work can be further understood.

⁶³² Cuba: Draft Plan of the Declaration of Human Rights (A/C.3/SC.4/8, 1 December 1948) *ibid* 2927-28.

⁶³³ Cuba: Proposal Concerning the Order of the Articles of the (Draft Declaration) (A/C.3/SC.4/8/Rev.1, 3 December 1948) *ibid* 2935.

⁶³⁴ Text of Articles 21 to 28 of the Draft Declaration as adopted by the Sub-Committee 4 (A/C.3/SC.4/17, 3 December 1948) *ibid* 2936.

⁶³⁵ Text of Articles of the Draft Declaration as adopted by the Sub-Committee 4 (A/C.3/SC.4/20, 3 December 1948) *ibid* 2942.

⁶³⁶ Draft Report of Sub-Committee 4 of the Third Committee (A/C.3/400, 4 December 1948) *ibid* 2953.

⁶³⁷ Summary Record of the Hundred and Seventy-Seventh Meeting of the Third Committee (A/C.3/SR.177, 6 December 1948). Draft universal declaration of human rights (E/800): Report of Sub-Committee 4 (A/C.3/400/Rev.1) *ibid* 2985.

⁶³⁸ Draft International Declaration of Human Rights: Report of the Third Committee (A/777, 7 December 1948) *ibid* 3008.

⁶³⁹ See, document (A/PV.180, 9 December 1948); (A/PV.181, 10 December 1948); (A/PV.182, 10 December 1948); (A/PV.183, 10 December 1948).

⁶⁴⁰ International Bill of Human Rights, Universal Declaration of Human Rights (10 December 1948 A/RES/217(III)).

⁶⁴¹ See also Dag Hammarskjöld Library, *Drafting of the Universal Declaration of Human Rights* < <http://research.un.org/en/undhr/chr/3> > accessed 11 April 2017.

3.5 Three approaches to understanding the right to work

The right to work contains legal as well as philosophical perspectives. Virginia Mantouvalou analyzed the right to work using positivist, instrumentalist and normative approaches as follows:⁶⁴²

- a) The positivist approach believes that as long as the right to work is protected in human rights documents, it is a human right.
- b) The instrumentalist (neo-Marxist) approach views the right to work as a human right if, for example, courts or civil society organizations can successfully employ it to promote the goals related to it.⁶⁴³ Instrumentalists prefer the use of legal tools to promote what is deemed as valuable. For example, the right not to be subjected to cruel and degrading punishment is a value itself, and can therefore protect other rights like the right to minimum content of welfare. The right to work as a human right can serve to protect other rights and goals, for example, the right to life.⁶⁴⁴
- c) The normative approach believes the right to work qualifies as a human right if there are sufficiently strong justifications for it to be treated as such.⁶⁴⁵ The normative approach combines philosophy and law to assess the theoretical justification and implications of the right to work as a right to be protected by law.

3.6 Nordic national constitutions as legal sources of the right to work

Apart from the Universal Declaration of Human Rights,⁶⁴⁶ the International Covenant on Economic, Social and Cultural Rights⁶⁴⁷ and the Revised European Social Charter,⁶⁴⁸ inter alia, the right to work has existed as far back as 1814 in Norway, with the constitution stating: ‘It is the responsibility of the authorities of the State to create conditions enabling every person

⁶⁴² V Mantouvalou, ‘Introduction’ in V Mantouvalou (ed), *The Right to Work: Legal and Philosophical Foundation* (Hart Publishing 2015) 1-9, 3.

⁶⁴³ Ibid.

⁶⁴⁴ Hugh, ‘Is There a Human Right to Work?’ in V Mantouvalou (ed), *ibid* 17- 38, 27.

⁶⁴⁵ Ibid.

⁶⁴⁶ Art 23 (1).

⁶⁴⁷ Art 6.

⁶⁴⁸ Art 1 (1).

capable of work to earn a living by his work’, and adding: ‘Specific provisions concerning the right of employees to co-determination at their work place shall be laid down by law.’⁶⁴⁹ Denmark’s constitution also recognizes the right to work, with the provision: ‘In order to advance the public interest, efforts shall be made to guarantee work for every able-bodied citizen on terms that will secure his existence’.⁶⁵⁰ The constitution of Finland meanwhile states: ‘The public authorities shall promote employment and work towards guaranteeing everyone the right to work’.⁶⁵¹ Generally, a constitution is the supreme law of a country. A constitutional right therefore imposes legal duties on those with power, courts for example, to realize the prescribed obligation.⁶⁵² The interpretation of constitutions requires consideration of the intentions of those who originally agreed it or subsequently amended it.⁶⁵³ Apparently, it is hard to argue that the right to work creates no obligations for those exercising power in the Nordics.

Outside the Nordics, the right to work is mentioned and recognized in a number of international treaties and jurisdictions.⁶⁵⁴ The right to work, usually asserted against private holders of power, employers, for instance, includes other rights related to employment.⁶⁵⁵ A right does exist ‘when an aspect of the individual’s circumstances is such that it imposes duties on others’.⁶⁵⁶ The right to work is constitutionally protected. It is also an economic and social right.

⁶⁴⁹ The Constitution, as laid down on 17 May 1814 by the Constituent Assembly at Eidsvoll and subsequently amended, most recently in May 2016, Art 110 < www.stortinget.no/globalassets/pdf/english/constitutionenglish.pdf > accessed 16 January 2018.

⁶⁵⁰ The Constitutional Act of Denmark, The Constitution of Denmark of 5 June 1953 (Translation) section 75 (1) < www.stm.dk/_p_10992.html > accessed 16 January 2018.

⁶⁵¹ Ministry of Justice, the Constitution of Finland, 11 June 1999 (731/1999, Amendments up to 1112/2011 included) (Unofficial translation) Section 18, < www.finlex.fi/en/laki/kaannokset/1999/en19990731.pdf > accessed 16 January 2018.

⁶⁵² K Möller, ‘Constructing the Proportionality Test: An Emerging Global Conversation’ in L Liora, C McCrudden and N Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014) 31-40, 31. See also R Alexy, ‘A Theory of Constitutional Rights’ (OUP 2002) cited in L Liora, C McCrudden and N Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014) 31.

⁶⁵³ D Howard, *Beginning Human Rights Law* (Routledge 2014) 44.

⁶⁵⁴ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, San Salvador, 17 November 1988 art 6; The African (Banjul) Charter on Human and Peoples’ Rights (adopted 27 June 1981, entry into force: 21 October 1986) art 15; The Arab Charter on Human Rights (adopted 15 September 1994) art 30; European Social Charter.

⁶⁵⁵ B Hepple (ed), *Social and Labour Rights in a Global Context: International and Comparative Perspectives* (3rd edn CUP 2005).

⁶⁵⁶ V Mantouvalou (ed), *The Right to Work: Legal and Philosophical Foundation* (Hart Publishing 2015) 5.

However, the degree of its justiciability, and whether it's implementable, i.e. can be enforced by courts of law if violated, is a question which needs further exploration.

3.7 Ongoing challenges to the right to work

The right to work is a loose term which is a composite of many rights and is also complementary to other rights. It can be understood from the obligations it imposes on three actors: States, employers and unions.⁶⁵⁷ The European Social Charter,⁶⁵⁸ for example, obligates signatory states to pursue policies that maintain full employment, protect the opportunity of every worker to earn his or her living in an occupation freely entered upon, and promote vocational training for the unemployed, etc. There is a duty for a State or employer to provide work although there is no right to be employed. As a 'value-laden phrase', it can be a right against the State, employer or a right against workers and trade unions.⁶⁵⁹ In other words, it can contain personal opinions. All in all, it is incumbent upon a State to, among other things, to maintain a full employment policy, protect every worker to earn his living in an occupation freely entered upon, provide and promote vocational services and training for all workers.⁶⁶⁰

However, because the right to work belongs to the realm of social policy, it can be altered, abolished, abused, etc. 'without any legal redress' except in situations when such violations are connected to issues of equality and non-discrimination.⁶⁶¹ According to Nussbaum, 'Accidents of birth and national origin can warp people's life chances pervasively and from the start', and while it is expressly the responsibility of each and every individual to fulfil his/her capabilities, governments also have a duty to take steps towards that end even in

⁶⁵⁷ E Albin, 'Universalising the Right to Work of Persons with Disabilities: An Equal and Dignity Based Approach' in V Mantouvalou (ed), *ibid* 61-85, 69.

⁶⁵⁸ Council of Europe, *European Social Charter* (adopted 18 October 1961, entered into force, 26 February 1965 European Treaty Series Number 35).

⁶⁵⁹ B Hepple, 'A Right to Work?' (1981)10, *Industrial Law Journal* 65, 68-9.

⁶⁶⁰ *Ibid* 69.

⁶⁶¹ *Ibid* 70.

case where redesigning [policies] is prohibitively expensive.⁶⁶² Hugh too observed that although the right to work is central in realizing human dignity, freedom and self-esteem, it still faces formidable challenges where the phrase itself can carry imprecise meaning.⁶⁶³ For example, the right to work under Article 23 of the UDHR is a group of four severable rights, could be interpreted as possibly including the right to free choice of employment or occupation, the right to favourable conditions of work, that everyone should be given a job even if the job is exploitive and pointless, or that the government is required to have an adequate social security system for the unemployed.⁶⁶⁴

Imprecise as it may be, the right to work can also be interpreted as capable of imposing both negative and positive duties on governments. For example, the phrase could mean that governments should not unjustifiably interfere with the right, or should intervene positively by protecting citizens from unemployment and its consequences. The right to work is multi-dimensional, that is, it contains many rights in one, such as the right to decent conditions of work, to a minimum wage, to freely participate in a trade union of one's choice, to strike if in conformity with statutory laws, to engage in collective bargaining, to job security, fair pay or equal pay for equal work of equal value, etc. Hugh continued by elucidating the impracticability of the right to work. It raises the issue of the duty of a State or someone else to provide work to everyone who wants it, and problematizes the question of duty-bearers. The right to work further raises the issue of inconsistency or 'hybridity' as a right. It encompasses civil rights like non-discrimination and as well as economic and social rights.⁶⁶⁵

The right to work is also an instrumental right; that is, it can be derived from other rights like liberty, dignity, subsistence, etc. Finally, the value of the right to work can be interpreted as incoherent: are there any interests that are valued by human beings protected by work in

⁶⁶² Martha C Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press 2006) 2; E Albin, 'Universalising the Right to Work of Persons with Disabilities: An Equality and Dignity Based Approach' in V Mantouvalou (ed), *The Right to Work: Legal and Philosophical Foundation* (Hart Publishing 2015) 61-85, 73.

⁶⁶³ C Hugh, 'Is There a Human Right to Work?' in V Mantouvalou (ed), *The Right to Work: Legal and Philosophical Foundation* (Hart Publishing 2015) 17-38, 21.

⁶⁶⁴ Ibid 22-23.

⁶⁶⁵ Ibid 26.

demeaning, monotonous, dangerous, frustrating or disappointing jobs, for example?⁶⁶⁶ Hugh further argues that there are always moments of frustration in all jobs and that finding a job that one enjoys all the time is sheer luck. Given the chance, many people would rather work less and have more leisure time, but very few, however wealthy, would give up work altogether.⁶⁶⁷ Here, one can wonder if ‘work is a necessary evil rather than an interest that all human beings value’.⁶⁶⁸ Again, if even the wealthiest citizens still want to work, and do not wish for indefinite holidays even when they can afford it, then the right to work must be very important in peoples’ lives. It must be given more weight than it has today.

But, why should economic and social rights - in this case, the right to work, cause so many arguments and counter-arguments or burdens, in terms of binding legal obligations to governments or others if they are to be realized? In Nickel’s analysis, the International Covenant on Economic, Social and Cultural Rights, for example, imposes legal duties to respect the right to work on States, not corporations and other employers.⁶⁶⁹ There is no requirement in the International Covenant on Economic, Social and Cultural Rights for ratifying States to enact legislation that would require, for example, employers to hire frequently or dismiss rarely, and States are encouraged to refrain from being ‘employers of last resort’.⁶⁷⁰ But, ethically, equal access to work and access to economic opportunities are important goals in peoples’ lives and political goals as well. The thesis proceeds to discuss the right to work with regard to interest theory.

3.7.1 Interest theory: correlative and converse duties

In interest theory, Amir Paz-Fuchs presents some simple explanations.⁶⁷¹ Society at large or individuals have a duty to putative rights holders because the duty is beneficial to them [rights

⁶⁶⁶ Ibid 20.

⁶⁶⁷ S Sayers, ‘The Need to Work: A Perspective from Philosophy’ in RE Pahl (ed), *On Work: Historical, Comparative and Theoretical Approaches* (Oxford, Blackwell, 1988) in C Hugh, ‘Is There a Human Right to Work?’ in V Mantouvalou (ed), *The Right to Work: Legal and Philosophical Foundation* (Hart Publishing 2015) 17-38, 20.

⁶⁶⁸ Ibid (n 182).

⁶⁶⁹ JW Nickel, ‘Giving Up the Right to Work’ in V Mantouvalou (ed), *The Right to Work: Legal and Philosophical Foundation* (Hart Publishing 2015) 137-148, 145.

⁶⁷⁰ *General Comment Number 18*, cited in JW Nickel *ibid*.

⁶⁷¹ A Paz-Fuchs, ‘The Right to Work and the Duty to Work’ in V Mantouvalou (ed), *The Right to Work: Legal and Philosophical Foundation* (Hart Publishing 2015) 177-194, 179.

holders]. Societies or individuals also benefit by performing or fulfilling that duty towards the rights holders. The relationship between duty bearer and rights holder is not that of peculiarity, but the duty is either ‘correlative’ or ‘converse’ (although this distinction is neglected more often than not).⁶⁷² Correlative refers to people’s private duties to respect the rights of others; while converse duties are those which individuals owe to their nation State. They are ‘ought’ or ‘due’ duties.⁶⁷³ Again, not all duties qualify as rights that benefit putative rights holders, but pressing a duty over others needs to be justified.

For example, what if individuals act irresponsibly, neglect their health, education and immediate living environment and afterwards demand that their rights be acknowledged?⁶⁷⁴ Such line of thinking is advanced by private citizens who strive for maximum freedom: Why should the State take away part of the fruits of their labour to aid the unfortunate, who bring misery on themselves by, for example, making poor choices or acting irresponsibly? However, ‘while individuals strive for maximum freedom, in a complex society they also face the limits of their capacities and resources, as well as their dependence on the support of others’.⁶⁷⁵ During the financial crisis, for example, States rescued private enterprises from collapse⁶⁷⁶ yet such institutions were ‘private’. Being materially poor and socially excluded owing to structural problems that originate from, for example, ethnic discrimination against certain groups of citizens, means that those individuals cannot, even when they try their best, profit from their capacities. Individuals in such situations usually lack the capacity to enjoy basic freedoms. Their social efforts to fully and constructively participate in society are severely derailed by the structural bottlenecks.

⁶⁷² JH Knox, ‘Horizontal Human Rights Law’ (2008) 1 *American Journal of International Law* 102 in V Mantouvalou (ed), *ibid* 180.

⁶⁷³ A Paz-Fuchs, ‘The Right to Work and the Duty to Work’ in V Mantouvalou (ed), *ibid* 177-194, 181.

⁶⁷⁴ *Ibid*.

⁶⁷⁵ M Mikkola, *Social Human Rights of Europe* (Karelactio 2010) 16.

⁶⁷⁶ Jason NE Varuhas, *Damages and Human Rights* (Hart Publishing 2016) 354.

3.8 Conclusion

Respect for and protection of the right of refugees to access meaningful employment can be achieved by interpreting the meaning of Article 23 of the UDHR. There are discrete factors, sometimes intertwined and blurred, that notoriously sustain and perpetuate the Gap. What starts as ordinary unemployment can last indefinitely, bringing material poverty, despair, disease and lack of integration. The right to work as set out in international human rights law, regional and Nordic domestic jurisdictions, would, if properly respected, limit the Gap and stop it becoming intractable. The right to work can be respected, however, only if it has strong justification. Economically, refugees, just like anyone else, are consumers of goods and services. Their resettlement creates demand for the goods and services they need; because goods and services are products of labour, men and women of working age willing and able to work are hired by capital to fulfil the demand. Such employees pay back into government revenues through taxes.

If refugees' right to work is not respected, they become passive consumers who never contribute to the creation of such goods and services. This can lead to other difficulties. For example, without earnings from the provision of their labour, refugees are condemned to a life of minimum income. Income inequality between those who work and those who do not is not only sustained, but the principle of redistribution of income loses its entire meaning. The reality contravenes Rawls' observation of the "difference principle", where inequality in wealth can be tolerated in a just society if it benefits that particular society's least advantaged people.⁶⁷⁷ The lack of employment opportunities destroys the dignity and self-esteem of the unemployed. They may lack concentration, have shorter life expectancy, focus on short-term goals of obtaining the means of minimal survival, and face social exclusion, *inter alia*. Under the Gap, refugees can never experience pride in their achievements, as their physical energy and mental capacity are never tested or challenged through work. Both individuals and society lose. If a refugee is outside the labour market for most of his or her productive years, financial independence is never achieved and choices remain limited in areas as diverse as food, medicines, property, marriage stability, holidays and education. If the principles of social justice were applied, refugees suffering long-term unemployment could seek redress by appealing to a court of law, for example.

⁶⁷⁷ F Dionigi and J Kleidosty, *A Macat Analysis of John Rawls's A Theory of Justice* (Macat International 2017) 11.

This chapter has also revealed that the Gap does not exist by mere accident. Ideological battles between owners of capital and labour are active in the Nordics. Strong trade unions sometimes have political power. They defend their interests above those of employers and new employees. Unless such action is approved by the workers' representatives, it can be hard for management to employ a new worker, let alone one with a refugee background. Local government authorities cannot do much to salvage the situation, either because of the beliefs in the free market principle of labour or *laissez-faire*. Refugees are encouraged to find work by themselves but the labour market is very imperfect. It is influenced by trade unions, government and employers, leaving refugees at enormous disadvantage. The situation can easily become an issue of equality and non-discrimination. If authorities and employers treated refugees with equal respect and concern, the Gap would be mitigated; the right to work cannot protect refugees when employers neglect people with a refugee background.

Understanding the right to work in Article 23 in the Universal Declaration of Human Rights requires reflecting at its origins to appreciate its *raison d'être*. The principle was developed to protect workers from general unemployment. It was further agreed that State authorities or the whole society were better suited to protect individuals. Peace, stability and social justice, etc., cannot be achieved when a section of the population is struggling with endemic, long-term unemployment, something observed as far back as 1919.

During drafting, although delegates disagreed sharply on the content of the Article, in the end there was a general consensus on the need to protect work by providing it or other alternative means of survival. In case where work was available, the worker had a right to be protected through improved labour conditions. To ensure equal pay between men and women for work of equal value, an equality clause was also incorporated into the main article. The reasons why the State was deemed to be better equipped to protect the right to work was never explained in detail, but States are generally powerful institutions. If human beings are to be free to enjoy freedom from fear and want, 'conditions must be created whereby everyone' enjoys 'civil, cultural, economic, political and social rights'.⁶⁷⁸ If any State decides to tackle any issue such as unemployment that result in poverty, which itself leads to welfare dependence, it can hardly fail to reach its goal.

⁶⁷⁸ UNGA Res/63/117 (10 December 2008), Annex para 3.

It is normally expected that countries use all technical and economic available resources, whether within or from outside the country, to achieve maximum benefits for their citizens.⁶⁷⁹ In the Nordics, for instance, war on the minimum core of economic and social rights was defeated with the introduction of the Scandinavian Model ie the universal welfare system provides free basic goods and services to all in need but who qualifies, at a minimum level. State authorities have access to all the country's other resources, which do not appear in the national budget. So, the role of a State in solving certain problems, like unemployment, cannot be underestimated. Governments can start projects to purposely employ refugees struggling with the government, which projects stimulate aggregate expenditures.

Legally, in the Nordics, except for Sweden, the right to work is a constitutional right. But even in Sweden, as long the Revised European Social Charter is recognised as a source of binding law, it cannot waive its State obligations to protect refugees from long-term unemployment. Whether the right to work is analysed using the positivist, instrumentalist or the normative approach or, whether it is seen through the eyes of interest theory, its respect is fundamental as far as mitigating the Gap is concerned. Unless States rediscover the reasons why the right to work was included in international human rights instruments, its power as a source of binding law remains unfulfilled.

⁶⁷⁹ Ibid para 5.

Chapter 4. Discrimination and its contribution to the Gap

Part I

4.1 Introduction

For a quick recap, the Gap is characterized by a persistent lack of employment or promotion opportunities. The phenomenon is more prevalent among refugees than any other group of immigrants. The causes of the Gap are labyrinthine and tangled. They are endogenous (intrinsic) but also exogenous: both directly linked to refugees' individual liabilities and originating in wider society. For example, the inconvertibility, mismatch or lack of appropriate education and work experience necessary in a competitive, dynamic labour market, are mostly endogenous. However, most resettled refugees quickly realize their internal vulnerabilities and seize all available opportunities to overcome them, for example learning the local language, adapting to the new culture, educating and re-educating themselves, training and retraining in new skills by participating in different apprenticeships, etc. Despite their resolve, effort and intentions, nearly half of refugees usually spend more than a decade before securing a job. Retaining an existing job can be as hard as obtaining it in the first place. In this context, it becomes necessary to analyze the exogenous factors, for example, the practice of discrimination against non-Europeans by the Nordic labour market. Discrimination is a formidable force which cannot easily be defeated and which blights refugees' lives in both short-term and the long-term.

When discrimination in the labour market is active, the new education and training acquired becomes stale and futile. Many refugees become "academic derelicts" because their skills, although strengthened by education, cannot find them a place in the labour market, except in a few sectors like homecare services, cleaning, warehouse work, etc. Like the rest of the population, not all refugees will fit into the few employment sectors 'designed' for them; nor will these few sectors absorb them all. In the same way that some vulnerable nationals avoid certain employment sectors, some refugees may also refuse to be trapped into jobs they don't feel comfortable with. The persistent and debilitating nature of the Gap, which results in many refugees becoming permanent clients of the welfare system, makes it necessary to examine discrimination as one of the causes of the situation. This chapter will examine why the labour

market discriminates against refugees, what form the discrimination takes, and why it remains so prevalent despite the presence of the various anti-discrimination laws and official counter-measures including ombudsmen (courts).

Complicated as discrimination is, it is nonetheless at the centre of international human rights.⁶⁸⁰ This chapter builds on research from other disciplines for the purposes of better understanding the concepts of discrimination and equality. The focus is to briefly explain what discrimination is in the context of international human rights law. It will also show the difficulties involved in applying such laws to refugees even in the presence of the various national anti-discrimination laws and Ombudsmen. The principle of equality and non-discrimination as understood in international human rights is the starting point.

4.2 Equality and non-discrimination

In Norway, refugees between the ages of 16 and 67 who have a Norwegian residence permit that forms the basis of permanent residency have a right and an obligation to complete 600 hours of basic Norwegian language training and social studies through the introduction programme.⁶⁸¹ Sweden⁶⁸² and Denmark⁶⁸³ also have introduction programmes for newly arrived immigrants. In accordance with provisions of the 1999 Integration Act,⁶⁸⁴ it is the work of the municipalities to provide an integration plan to newly arrived refugees and reunified family members in Denmark. The integration programme is 37 hours per week, lasts three years (the

⁶⁸⁰ See for example, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Universal Declaration of Human Right (UDHR), Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe, CSCE (29 June 1990) (The Copenhagen Document) 5.9.

⁶⁸¹ IMDi, 'Introduction Programme and Norwegian Language Training' < www.imdi.no/en/introduction-act/introduction-programme-and-norwegian-language-training/#title_2 > accessed 17 November 2016. For comparison of the Introduction Programme between Denmark, Norway, and Sweden, see V Hernes and KR Tronstad (NIBR report 2014:19) 16-26.

⁶⁸² Sverige, *Arbetsmarknadsdepartementet 'Lag om Etableringsinsatser för Vissa Nyanlända Invandrare'* (Sweden, Ministry of Labour, Act Establishing Activities for Newly Arrived Immigrants (SFS 2010:197, 2010).

⁶⁸³ Denmark, *Bekendtgørelse af Lov om Integration af Udlændinge i Danmark (Integrationsloven)* (Executive Order on the Act of Integration of Foreigners in Denmark) (Act of Integration) (LBK Number 1094, 7 October 2014).

⁶⁸⁴ P Bevelander et al., *Scandinavia's Population Groups Originating from Developing Countries: Change and Integration* (TemaNord 2013:561, Nordic Council of Minister 2013) 43.

introduction period) and includes all participants aged over 18 years.⁶⁸⁵ During the three years of the Introduction Programme, participants must reside in the municipalities they are resettled in.⁶⁸⁶

In Finland too, immigrants must have an integration plan where they learn Finnish or Swedish⁶⁸⁷ for a maximum of three years,⁶⁸⁸ which can be extended to five⁶⁸⁹ according to an individual's circumstances. The Nordic experience shows that many refugees, including their offspring, do not escape the Gap's tentacles even after 10 years of continuous residency.⁶⁹⁰ External or exogenous factors may contribute more than endogenous factors. The two intricately interact to complicate the Gap, and, being externally determined, exogenous factors are more complicated to handle. One such factor could be the general disregard and disrespect of the principle of equality and non-discrimination. Equal treatment and non-discrimination are fundamental, so it is necessary to elucidate what equality means in law.

In the introductory comment to the general prohibition of discrimination in Protocol 12 to the European Convention on Human Rights (ECHR),⁶⁹¹ William A. Schabas noted that 'equality and protection against discrimination lie at the core of modern human rights law', beginning with the Charter of the United Nations.⁶⁹² The principle of equality and non-discrimination is found in many other international instruments including the Universal Declaration of Human Rights.⁶⁹³ However, equality and its components are complex concepts as the following section will highlight.

⁶⁸⁵ P Bevelander et al., *ibid* 43.

⁶⁸⁶ *Ibid*.

⁶⁸⁷ Ministry of Employment and the Economy, Act on the Promotion of Immigrant Integration (1386/2010) s11 (1).

⁶⁸⁸ *Ibid* s12 (3).

⁶⁸⁹ *Ibid* s12 (4).

⁶⁹⁰ *Statistiska centralbyrån, Statistical News from Statistics Sweden* (Number 2014:566)> www.scb.se/en_/Finding-statistics/Statistics-by-subject-area/Living-conditions/Living-conditions/Integration---analysis/Aktuell-pong/224589/Behallare-for-Press/379538/ > accessed 17 November 2016; AH Midtbøen 'The Invisible Second Generation? Statistical Discrimination and Immigrant Stereotypes in Employment Processes in Norway' (2014) 40 (10) *Journal of Ethnic and Migration Studies* 1657.

⁶⁹¹ Article 1.

⁶⁹² WA Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 1177.

⁶⁹³ Articles 1 and 2.

4.21 Formal equality

Even in simple terms, equality is not synonymous with equal treatment, but both can loosely mean ‘formal equality’, where ‘likes must be treated alike’.⁶⁹⁴ Philosophically, the form and substance of equality or equal treatment are based on Aristotelian thinking: ‘...one takes law (right) for equality, and it is, but equality only for equals, not for all. And thus, one takes inequality for law (right), and it is, but not for all, but only for unequals’ [sic].⁶⁹⁵ Equality was formal and was the basis of law and justice. In a just world, all persons are equal in rights even though they are unequal in other areas. On the other hand, equality is distinguishable from equal treatment. Aristotle continued: ‘Things [and persons] that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unalikehood’ [sic].⁶⁹⁶ Understanding equality the way Aristotle did has been called proportionality or arithmetic equality, which is no longer adequate.⁶⁹⁷

4.2.2 Substantive equality, corrective and distributive justice

All persons, by their very nature, differ diametrically but not in rights. Applying arithmetic equality, even unreservedly and restrictively, cannot result in the total equality of persons. Hence, a call for ‘substantive equality’ is envisaged.⁶⁹⁸ Substantive equality is a multi-dimensional concept but could simply comprise equality of results, equality of opportunities and equality to other rights termed as substantive, for example, freedom of expression, equal respect, capabilities, etc.⁶⁹⁹ Equality could also mean corrective justice where, for instance, two autonomous parties enter an exchange of restricted interaction but need to establish their original

⁶⁹⁴ B Hepple, *Equality: The Legal Framework* (2nd edn Hart Publishing 2014)11.

⁶⁹⁵ Aristotle, *Politeia*, 1280a (translated by T Saunders 1995) in D Schiek, L Waddington and M Bell (eds), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing 2007) 26.

⁶⁹⁶ Aristotle, *Ethica Nichomachea* 1131a-6 (translated by W Ross 1925) in D Schiek, L Waddington and M Bell (eds), *ibid* 27.

⁶⁹⁷ *Ibid*.

⁶⁹⁸ See, for example, UNGA Res 20/2106 (XX), (ICERD) articles 5 (e-f); UNGA Res 34/180 (CEDAW) articles 3, 11.

⁶⁹⁹ C Barnard and B Hepple, ‘Substantive Equality’ (2000) 59 (3) *The Cambridge Law Journal* 564.

position.⁷⁰⁰ If, for example, a compensation fund is set up to compensate refugees for the time spent in education and apprenticeships that yield no job offers, a form of corrective justice would be achieved. The European Court of Human Rights found that failure to handle proceedings within *reasonable time* had breached Article 6 (1) of the European Convention on Human Rights (ECtHR).⁷⁰¹ The case was about the division of property between the complainant and her former husband but it became a human rights issue.

Equality can also be understood to be distributive justice, where opportunities and resources that societies have control over are distributed adequately and fairly.⁷⁰² The duty of distributive justice falls squarely on all citizens, not to any single individual. Formal equality, in a nutshell, is a symmetrical model demanding factual equality to anyone who might have been discriminated against, for instance. Substantive equality, on the other hand, complements formal equality. In equal treatment cases, comparable situations are supposed to be treated equally while non-comparable situations are not to be treated as identical.

4.2.3 Equal treatment is not an absolute requirement

Discrimination on all protected grounds like religion, ethnicity etc. is prohibited whether it is actual, assumed, former or future.⁷⁰³ In accordance with European Union law, the equal treatment principle means no direct or indirect discrimination;⁷⁰⁴ specifically it means no discrimination on the grounds of race or ethnic origin.⁷⁰⁵ However, a difference in treatment can be justified if ‘it has an objective purpose, it is necessary to achieve the purpose’, and the

⁷⁰⁰ D Schiek, L Waddington and M Bell (eds), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing 2007) 29.

⁷⁰¹ *Normann v. Denmark*, Application Number 44704/98 (ECtHR First Section) (14 June 2001).

⁷⁰² *Ibid.*

⁷⁰³ Norway, The Ethnicity Anti-Discrimination Act, s6.

⁷⁰⁴ EU Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation OJ L 303/16 (Directive 2000/78/EC) art 1.

⁷⁰⁵ EU Council Directive 2000/43/EC of 29 June 2000 Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic origin, OJ L180/22 (Directive 2000/43/EC) art 2(1).

negative impact created on the victim is ‘proportionate in view of the intended result’.⁷⁰⁶ Treating ‘all like people alike’, on the other hand, requires consistency, but to determine when two people are ‘sufficiently similar to qualify for equal treatment’ can be hard work.⁷⁰⁷ For example, comparing refugees’ labour market chances with those of the local population can be futile. The former have many disadvantages compared with the latter. Refugees’ starting point after resettlement is much lower due to, for example, lack of fluency of the local language; and the would-be useful social networks are fewer and narrow. ‘Consistent treatment’ is also controversial as may require treating all persons equally badly in a comparable situation.⁷⁰⁸ If consistent treatment is aimed at depriving both people of a benefit, this is levelling down; if the process involves granting the benefit to both, then levelling up can be achieved.⁷⁰⁹

If refugees have access to employment as a resource, they too inevitably can contribute to the distributive-justice-pool in the form of taxes and other sacrifices. This could be seen as levelling up. Equality, in short, means rectifying the socially maladjusted situations many people, especially the most vulnerable of any society, who have no hope of improving their situation unless society acts selflessly and expeditiously. If the principles of equality and non-discrimination are disrespected, individuals’ talents are unexploited, human dignity dissipates and the discriminated-against miss out on the best of what life has to offer.⁷¹⁰ Equality of chances, as envisaged by Rawls, becomes elusive.⁷¹¹ But for a claim of discrimination to have legal meaning, it must have a legal basis backed by facts. This thesis will now consider the juridical meaning and what it means to be discriminated against. A panacea to the Gap, even a partial one, is possible only if discrimination is tackled from all angles. Policies based on anti-discrimination laws can be effective antidotes to the Gap.

⁷⁰⁶ EU, Council Directive 2000/43/EC, s7. See also UN CERD, *General Recommendation Number 32: The Meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination* (24 September 2009, CERD/C/GC/32) paras 7-9.

⁷⁰⁷ B Hepple *Equality: The Legal Framework* (2nd edn Hart Publishing 2014) 24.

⁷⁰⁸ Ibid 25.

⁷⁰⁹ Ibid.

⁷¹⁰ E Ellis and P Watson, *EU Anti-Discrimination Law* (2nd edn OUP 2012) 1.

⁷¹¹ J Rawls, *A Theory of Justice* (Harvard University Press 1971) in M Peucker, ‘Ethnic Discrimination in the Labour Market: Empirical Evidence on a Multi-Dimensional Phenomenon’ (EFMS paper 2009-3) 3/26.

4.3 Discrimination: A gnostic chasm?

Discrimination can be subjective as well as experienced. It can be direct or indirect. When direct, it is overt and when indirect, it is often covert. In cases of genuine occupational requirements,⁷¹² for example, discrimination can be justified. In law, discrimination has been dealt with quite satisfactorily. However, what discrimination itself ‘consists of’ can result in fierce disagreements.⁷¹³ Since discrimination is also a social concept, it is prudent to start the analysis of its constituents and mechanisms from a sociological perspective.

In his working paper, for example, Mario Peucker noted that discrimination is not ‘*terra incognita*’ in the European Union or indeed elsewhere.⁷¹⁴ Discriminators may conceal or defend their behaviour. Unequal treatment or ethnic discrimination against immigrants is ‘politically condemned, legally banned across the EU, morally rejected by most (EU) citizens and [is] economically illogical’⁷¹⁵ but is endemic. Mario Peucker summarized how discrimination operates:

‘Discrimination operates usually in disguise, at multiple levels, in various forms ranging from interpersonal interactions and inter-group relations to macro-societal mechanisms; it can be an individual person who discriminates or a certain practice or even a legal provision that results in reinforcing ethnic inequalities; it can happen on purpose – for different reasons –or unintentionally.’⁷¹⁶

Mario Peucker divided labour market discrimination, the main contributor to the Gap and therefore the focus of this chapter, into two main categories: interpersonal and structural discrimination.

4.3.1 Interpersonal discrimination

Interpersonal discrimination can be sub-divided into four smaller clusters. The first is ‘resentment-based discrimination’, which comprises practices involving racist, xenophobic,

⁷¹² Council Directive 2000/43/EC art 2 (2) (b).

⁷¹³ Committee on Civil and Political Rights (CCPR), *General Comment 18: Non-Discrimination* (10 November 1989) para 6.

⁷¹⁴ M Peucker (EFMS-paper 2009-3) 3/26.

⁷¹⁵ Ibid.

⁷¹⁶ M Peucker ibid 5/26.

nativistic or ethno-centric attitudes, and involves stereotyped views held by the majority population towards minorities. The second category is ‘societal discrimination’, where employers purposely avoid recruiting or promoting a member of the discriminated-against group because society as a general rule might believe that there is potential or anticipated conflict that can result in negative economic consequences. The third cluster is ‘statistical discrimination’, where individuals are denied the chance of proving their skills or competencies since employers lack information on an individual’s personal skills, productivity or other resources.⁷¹⁷ It is argued that the motive is purely economic because the would-be employers do not assess an applicant’s productivity and other contributions they might make. It is further noted that statistical discrimination can easily become resentment-based discrimination, particularly if such assumptions reflect ethnically based stereotypes founded on incorrect information. Finally, the fourth category, ‘opportunistic discrimination’, involves taking advantage of those already in weaker positions in society and the labour market in general.

4.3.2 Structural discrimination

Structural discrimination, Peucker notes, involves mechanisms, practices and provisions whose effects are discriminatory. No individual can be directly responsible for this type of discriminatory treatment or outcome.⁷¹⁸ ‘Indirect discrimination’ is a form of structural discrimination. It occurs when, for example, employers demand qualities or skills that are not necessary for the requirements of the job. The demand for language skills at native or mother tongue level in jobs that require little or no verbal communication is a good example. Filling new positions solely through the current workforce, family and other social networks is also another example. Another type of structural discrimination is ‘past-in-present discrimination’. This involves negative effects rooted in previous intentionally discriminatory practices, now abolished, that create and reinforce societal structures resulting in persistent inequalities for second or third generation immigrants. There is also ‘institutional discrimination’⁷¹⁹ which,

⁷¹⁷ See also O Åslund, A Forslund and L Liljeberg, ‘Labour market entry of non-labour migrants – Swedish evidence’ in B Bratsberg et al., *Nordic Economic Review: Labour Market Integration in the Nordic Countries* (TemaNord 2017:520, Nordic Council of Ministers 2017) 115-158, 148.

⁷¹⁸ M Peucker (EFMS-paper 2009-3) 7/26.

⁷¹⁹ M Peucker *ibid* 5/26.

although it is vaguely understood and ‘over-generalised’, involves discrimination that originates with or is re-enforced by institutional structures and institutions. The effects of discrimination like inequality are thus exacerbated and reinforced. Peucker’s work is insightful and informative. However, the observations and explanations of discrimination can be interpreted as general in form and content; or too theoretical. The answers they provide may not be adequate from a legal perspective, which requires evidence backed by legal provisions. However, they are relevant to the Gap. They provide a different angle not based on legal principles through which discrimination can be conceptualized.

4.3.3 General consequences of discrimination

Generally, when persons feel that they are being discriminated against, they can develop negative attitudes towards the discriminator. It does not matter whether the feeling is subjective or objective or whether the discriminator is an individual, a corporation or the community at large. People who are discriminated against in employment recruitment ‘suffer from an earnings penalty’,⁷²⁰ leading to segregated workplaces⁷²¹ and alienation. Repeated job applications resulting in no job offers can often lead to the phenomenon of ‘discouraged workers’.⁷²² This is the situation in which job-seekers give up looking for work owing to repeated experiences of rejection, which may be the result of discrimination or other factors.

Furthermore, because of the lower incomes of the unemployed, they are more likely to consume cheaper and more fattening foods that may cause obesity,⁷²³ which damages their health too.⁷²⁴ In short, the process of discrimination can become a vicious circle. Discrimination leads to unemployment which results in low resources and limited choices, which in turn leads to

⁷²⁰ E Patacchini, G Ragusa and Y Zenou, ‘Discrimination and Labor Market Outcomes: Theoretical Mechanisms and Existing Empirical Studies’ in T Boeri, E Patacchini and G Peri (eds), *Unexplored Dimensions of Discrimination* (OUP 2015) 149-67.

⁷²¹ Ibid 152.

⁷²² OECD, ‘Discrimination against Immigrants – Measurement, Incidence and Policy Instruments’ in *International Migration Outlook 2013* (OECD Publishing, Paris 2013) 191-231, 208 < www.oecd-ilibrary.org/docserver/download/8113141ec007.pdf?expires=1508879865&id=id&accname=oid026390&checksum=013B1B8F195732AE248605153B679F30 > accessed 21 October 2017.

⁷²³ J Cawley, ‘The Impact of Obesity on Wages’ (2004) 39 *Journal of Human Resources* 451, 163.

⁷²⁴ Ibid 162.

consumption of cheaper but fattening foods, which contributes to poor health of which obesity is one of the best-known examples.

Still, if individuals are educated, qualified or trained but are discriminated against, they are less likely to invest in more education and training, which further reduces their employment opportunities. In addition, people do not generally want to be discriminated against. Youngsters, for example, can ‘either deny that discrimination occurs (against them) or avoid situations in which they are likely to experience discrimination’.⁷²⁵ This may result in avoidance of the discriminator or discriminating situation. Avoidance is a psychological, adaptive behaviour that may lead to a situation where the person being discriminated against ‘no longer applies to employers who are known to not recruit immigrants [refugees], or they avoid clubs (and other social activities) ‘where they know that they will be refused entry’ because of their ethnicity, for example.’⁷²⁶

However, despite the existence of labour market discrimination against immigrants including refugees, studies have failed to wholly assign the disadvantage to discriminatory practices. What is termed ethnic discrimination may be caused by other factors. Immigrants [refugees] and sometimes their descendants may lack knowledge about potential openings in the labour market; they may lack the networks and personal contacts through which many vacancies are filled; they may lack knowledge about the process; or they may simply have different preferences that lead them to apply for different types of jobs.⁷²⁷ But, much as long-term unemployment can be attributed to many factors, discrimination cannot be just neglected. For example, a 2012 Eurobarometer⁷²⁸ study found that the most widespread form of discrimination in the European Union was that based on ethnic origin, followed by disability discrimination.

Despite the relative ‘attractiveness’ of discrimination on the side of the discriminator, it is nonetheless prohibited by various international treaties, regional and various domestic anti-discrimination legislations. The section therefore introduces and discusses discrimination in the light of the international human rights law instruments.

⁷²⁵ OECD, *ibid* (n 722) 191-231, 207.

⁷²⁶ *Ibid*.

⁷²⁷ OECD, *ibid* 208.

⁷²⁸ European Commission, *Discrimination in the EU in 2012* (Report, Special Eurobarometer 393 / Wave EB77.4 TNS Opinion and Social, Directorate-General Justice and coordinated by Directorate-General for Communication 2012) 16.

4.3.4 The comparative approach

In order to understand the concept of discrimination, there is a need to widen the sources and perspectives through which it is analyzed. To understand the mechanisms of non-discrimination, one can assess the concept from the perspective of other sources, for example, sociology.⁷²⁹ It is also suggested that one can use comparative approaches to borrow from different fields of law, political science, economics, etc. Understanding, for instance, the reasons for and persistence of inequality and exclusion - concepts that are inseparable from the Gap - a comparative approach can be used.⁷³⁰ ‘Non-discrimination law has many or multiple missions... and is so deeply engrained with meaning that a new reader of discrimination law can easily get lost in a mire of concepts and aims’.⁷³¹ Contextually, the Nordics’ experience of recent immigration and how it has shaped the field of discrimination can be better captured by looking into different sources of laws, cases, studies, etc. from both within and outside the Nordics.

4.3.5 A tiny pebble in the Nordics’ shoes?

Not long ago, the Nordics’ population was ‘relatively’,⁷³² or ‘fairly homogeneous’.⁷³³ Finland was, for instance, one of the most culturally homogenous countries in Western Europe before the 1980s.⁷³⁴ As diversity has increased, discrimination has become a real problem to be dealt with.⁷³⁵ In 2014, the United Nations Committee on Economic, Social and Cultural Rights was ‘concerned that discrimination against persons with immigrant backgrounds’, for example, Somalis and members of minorities, like Russian-speakers and Roma, was persistent in many

⁷²⁹ D Schiek, L Waddington and M Bell (eds), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing 2007) 6.

⁷³⁰ D Schiek, L Waddington and M Bell (eds), *ibid.*

⁷³¹ *Ibid.*

⁷³² See the executive summaries of country reports on non-discrimination sent to the European Commission, LE McClimans, *Country Report – Non-discrimination – Norway – 2015*, 5; P Justesen, *Country Report-Non-Discrimination-Denmark-2016*, 5.

⁷³³ P Norberg, *Country Report- Non-discrimination Sweden- 2016*, 5.

⁷³⁴ R Hiltunen, *Country Report-Non-Discrimination- Finland-2016*, 5.

⁷³⁵ For Sweden, see the Concluding Observations of the Committee on Economic, Social and Cultural Rights, *Consideration of reports submitted by states parties under articles 16 and 17 of the Covenant* (1 December 2008, E/C.12/SWE/CO/5) para 16.

fields like employment, education, etc.⁷³⁶ It should be noted that even in 2008, the Committee had regretted that ‘despite the measures adopted by the State party to enhance its legal and institutional mechanisms aimed at combating discrimination, de facto discrimination against foreigners and members of national, racial and ethnic minorities...’ was still widespread especially in the fields of employment,... and access to public places such as restaurants and bars.⁷³⁷ The Committee still regretted that: despite the many initiatives taken by the State party to combat racial discrimination, racist attitudes prevail among the population, perpetuating discrimination against minorities and foreigners, especially in employment.’⁷³⁸

In order to confront discrimination, all the Nordics have therefore set up anti-discrimination legislation and ombudsman (equality bodies).⁷³⁹ However, their case law base is still in its infancy and some cases are claimed to be new (novel), for example, ‘*Hijab-saken*’ (the *Hijab-case*) in Norway.⁷⁴⁰ A hairdresser who denied service to a Muslim client wearing a headscarf lost the case because, although the defendant argued that, to her, a headscarf was a political symbol, the court ruled that the headscarf was a religious symbol, and the claimant had therefore suffered discrimination because of her religion. Other cases are not systematically registered in discrimination databases as they are dealt with by different courts, for example, in Denmark.⁷⁴¹ Cases of discrimination brought to courts and discrimination ombudsmen were on increase. For example, the Equality and Anti-Discrimination Ombudsman of Norway handled 148 cases in 2007 and by 2015, the number had reached 1962.⁷⁴² There were 424 cases relating to

⁷³⁶ CESCR, *Concluding Observation on the Sixth Period Report of Finland* (17 December 2014 E/C.12/FIN/CO/6) 12

⁷³⁷ CESCR, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant* (Concluding Observations of the Committee on Economic, Social and Cultural Rights, Finland, 16 January 2008 E/C.12/FIN/CO/5) para 13.

⁷³⁸ CESCR, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant* (Concluding Observations of the Committee on Economic, Social and Cultural Rights, Finland, 1 December 2000, E/C.12/1/Add.52) para 14.

⁷³⁹ For Denmark, the Board of Equal Treatment, and the National Human Rights Institute of Denmark function as the main Equality bodies. Finland has the Non-Discrimination Ombudsman (for discrimination cases) and the Equality Ombudsman (for gender and gender identity). Norway has the Equality and Anti-Discrimination Ombud (the Equality Ombud) the appeal court for discrimination, the Equality, and Anti-Discrimination Tribunal (the Equality Tribunal) and Sweden has the new Equality Ombudsman.

⁷⁴⁰ See Case Number 16-09626-MED-JARE (2016) which is said to be the first of this kind.

⁷⁴¹ P Justesen, *Country Report – Non-Discrimination – Denmark – 2016*, 79.

⁷⁴² *Likestillings- og diskrimineringsombudet, ‘Klagesaker’* (The Equality and Anti-Discrimination Ombud Complaints) < www.ldo.no/nyheter-og-fag/ldos-statistikk/klagesaker/ > 14 November 2016.

discrimination on the grounds of ethnicity or language, while religious discrimination had triggered 46 cases.⁷⁴³ This was an increase of 92 per cent in nine years.⁷⁴⁴ It is however not clear whether the increase was due to increase in incidents of discrimination or whether it was due to improvement in the system of registration. The systematic registration of cases handled by the Equality and Anti-Discrimination Ombud, the national machinery which hitherto has adjudicated 95 per cent of discrimination claims in Norway,⁷⁴⁵ reveals that 2007 is the first year in which cases of discrimination were registered digitally in the system.⁷⁴⁶ No cases before this period are accessible electronically. It can happen that cases of discrimination claims were not handled by one central organ.

In Denmark, 2009 is the year when the Board of Equal Treatment started to register cases in central system electronically.⁷⁴⁷ Prior to that period, no cases could be accessed electronically. Denmark's Equality Body was established in 2009 and by 2016, it had so far dealt with 229 cases involving ethnic discrimination and 95 cases falling under the category 'multiple and other cases'.⁷⁴⁸ There were 203 cases of discrimination because of ethnicity, while multiple-discrimination cases totaled 86 (2009 to 2015 inclusive).⁷⁴⁹ It should be noted that refugees are more likely than other groups to suffer multiple discrimination, i.e. discrimination on multiple grounds.

In Denmark, an allegation of discrimination can be brought before the civil courts, labour courts, and the two equality bodies, i.e. the Board of Equal Treatment and the Institute of Human Rights (the National Human Rights Institute of Denmark). Discrimination can also be handled by

⁷⁴³ Ibid.

⁷⁴⁴ $[(1962-148)/1962] \times 100 = 92\%$.

⁷⁴⁵ LE McClimans, Country Report – Non-discrimination – Norway – 2015, 9.

⁷⁴⁶ *Likestillings- og Diskrimineringsombudet*, 'Alle Henvendelser' (The Equality and Anti-Discrimination Ombud, 'All Inquiries') < www.ldo.no/nyheter-og-fag/ldos-statistikk/alle-henvendelser/ > 14 November 2016.

⁷⁴⁷ *Ligebehandlingsnævnet*, 'Tal og Statistik fra Ligebehandlingsnævnet' (Board of Equal Treatment, 'Figures and Statistics from Board of Equal Treatment') < <https://ast.dk/naevn/ligebehandlingsnaevnet/tal-og-statistik-fra-ligebehandlingsnaevnet> > accessed 15 November 2016.

⁷⁴⁸ *Tal og statistik fra Ligebehandlingsnævnet 'Etnicitet'*: 2009: 22, 2010: 26, 2011: 43, 2012: 18, 2013: 36, 2014: 37, 2015: 22, 2016: 25 = 229 (Numbers/Figures and Statistics from the Equal Treatment Body, 'Ethnicity') < <https://ast.dk/naevn/ligebehandlingsnaevnet/tal-og-statistik-fra-ligebehandlingsnaevnet> > accessed 19 October 2017.

⁷⁴⁹ Ibid.

other branches of the Danish legal system. But, despite this, and even though many actors work hard to prevent and punish acts of discrimination, it still occurs.⁷⁵⁰

In Finland, Roma, Russian and Somalis appeared to be the most discriminated, and were likely to be victims of racial and xenophobic attacks.⁷⁵¹ There was discrimination in employment, ... 'racist hate speech also by politicians, and extreme marginalization of young Somalis'.⁷⁵² The Non-Discrimination Ombudsman of Finland started work as recently as 2015, and the former Ombudsman for Minorities dealt only with discrimination on grounds of race and ethnic origin, mostly in employment. However, cases of discrimination have been handled by the National Non-Discrimination and Equality Tribunal,⁷⁵³ and other courts. But as noted by Commissioner for Human Rights of the Council of Europe, protection against discrimination in Finland was 'characterized by a fairly complex legal and institutional framework'.⁷⁵⁴ On a positive note, the same Report⁷⁵⁵ noted that Finland had ratified Protocol Number 12⁷⁵⁶ to the European Convention on Human Rights which generally prohibited discrimination and that there was an equality clause in the Finnish Constitution.⁷⁵⁷ Still, the Finnish Non-Discrimination Act (21/2004)⁷⁵⁸ prohibited discrimination on many grounds. Direct and indirect discrimination in areas of employment, education, etc, was also prohibited and authorities were obliged to promote equality.⁷⁵⁹

In Sweden, the Discrimination Ombudsman (DO) is the *de jure* government agency working on behalf of the Swedish parliament and the government to combat discrimination,

⁷⁵⁰ P Justesen, *Country Report-Non-Discrimination – Denmark – 2016*.

⁷⁵¹ Nils Muižnieks, Commissioner for Human Rights of the Council of Europe, *Report CommDH (2012) 27* (Strasbourg 25 September 2012) para 2.

⁷⁵² *Ibid.*

⁷⁵³ National Non-Discrimination and Equality Tribunal of Finland < http://yvtltk.fi/en/index/opinionsanddecisions/decisionsofdiscriminationtribunal2004-2014_0.html > accessed 20 September 2017.

⁷⁵⁴ Report CommDH (2012) 27 *ibid* (n 751) para 30.

⁷⁵⁵ *Ibid* para 31.

⁷⁵⁶ European Treaty Series Number 177 (4 November 2000).

⁷⁵⁷ Report CommDH (2012) 27 (25 September 2012) para 31.

⁷⁵⁸ *Ibid.*

⁷⁵⁹ *Ibid.*

promote equal rights and opportunities. In its Annual Report of 2016,⁷⁶⁰ the Discrimination Ombudsman handled 572 cases of ‘ethnic belonging’ (*‘etnisk tillhörighet’*) or discrimination because of racial or ethnic origin and 124 cases of discrimination because of religion or other belief.⁷⁶¹ Discrimination because of religion had slightly declined by 91 cases i.e. from 663 in 2015 to 572 in 2016.⁷⁶² Overall the Discrimination Ombudsman handled 1966 cases in 2016, 2252 in 2015 and 1810 in 2014.⁷⁶³ Can it be concluded that discrimination was generally on the decline?

These statistics raise few questions. The number of cases are fewer compared with the number of refugees in Sweden. On an annual basis, about 1,900 quota refugees have been resettled in Sweden since 1950.⁷⁶⁴ Compared to the number of refugees in Sweden, the numbers are a bit lower. Does it mean that the incidence of refugee discrimination in Sweden is lower than, say, Norway? Could there be other factors, like lack of enthusiasm by would-be victims to report to the anti-discrimination body?

Norway, on the other hand, resettles relatively fewer quota refugees than Sweden but the Equality and Anti-Discrimination Ombud (*‘Likestilling- og diskrimineringsombudet’, LDO*) handled 1721 and 1974 in 2014 and 2015 respectively.⁷⁶⁵ Compared with Finland and Denmark, Norway has registered a lot more cases of discrimination. Why this is so requires further investigation but it is beyond the scope of this thesis. However, the evidence points to many gaps in the way discrimination is dealt with by the Nordics. Long-term unemployment is more prevalent among refugees than among any other groups of citizens. It can thus provide circumstantial evidence of discrimination, which cannot just be overlooked. Anti-discrimination

⁷⁶⁰ *Diskrimineringsombudsmannen, ‘Årsredovisning 2016’ (Diskrimineringsombudsmannen, DO, 2017)* (Discrimination Ombudsman, Annual Report 2016) < www.do.se/globalassets/om-do/arsredovisning-2016.pdf > accessed 19 October 2017.

⁷⁶¹ *Ibid*, *Annual Report 2016*, 41(76).

⁷⁶² *Ibid* 41(76)

⁷⁶³ *Ibid*, *Annual Report 2016* < www.do.se/globalassets/om-do/arsredovisning-2016.pdf > accessed 19 October 2017.

⁷⁶⁴ UNHCR, *Country Chapter: UNHCR Resettlement Handbook* (July 2011, revised September 2014, revised October 2016) <www.unhcr.org/3c5e5a219.pdf> accessed 20 September 2017.

⁷⁶⁵ *Likestillings- og diskrimineringsombudet, ‘Alle henvendelser etter diskrimineringsgrunnlag 2007-2015. Antall’* (The Equality and anti-discrimination Ombud, ‘All occurrences according to reason of discrimination 2007-2015. Figures’ <www.ldo.no/nyheter-og-fag/ldos-statistikk/alle-henvendelser/> accessed 04 November 2017.

laws in the Nordics are relatively new concepts, so it is preferable to start the analysis of discrimination based on international human rights law instruments.

4.5 International sources of anti-discrimination laws

The Convention on the Elimination of All Forms of Racial Discrimination⁷⁶⁶ is recognized as binding in all the Nordic countries except Sweden.⁷⁶⁷ The United Nations acknowledged the existence of racial discrimination and as such, a Convention prohibiting it was adopted as far back as 1965.⁷⁶⁸ In the Convention, discrimination was define as:

‘... any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.’⁷⁶⁹

Again, in order to realize the protection of human rights, and to understand some of the meanings and constituents of discrimination, all States should embrace the principle of non-discrimination.⁷⁷⁰ States can derogate from certain obligations in case of public emergency, but these situations must not involve discrimination where the common denominator is race, colour, sex, language, religion or social origin.⁷⁷¹ It should be noted that the General Comments are designed for the dual purpose of assessing and examining States’ reports submitted under human rights treaties; and to produce concluding observations/comments regarding those reports.⁷⁷²

⁷⁶⁶ UNGA, Res 2106 (XX) (adopted 21 December 1965 entered into force: 4 January 1969) (ICERD).

⁷⁶⁷ For Sweden, see *Country Report – Non-discrimination – Sweden – 2016* (Annex 2, Table of International Instruments).

⁷⁶⁸ ICERD.

⁷⁶⁹ ICERD art 2 para 1.

⁷⁷⁰ United Nations, International Human Rights Instruments, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, *General Comment 18: Non-discrimination* (29 July 1994, UN Doc HRI/GEN/1/Rev.1) para 26.

⁷⁷¹ CESCR, *General Comment Number 18: Non-discrimination* *ibid*.

⁷⁷² P O’Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2012) (2012) 33.

Sex discrimination, particularly against women, is also a matter of sufficient concern to warrant a United Nations Convention.⁷⁷³ In Europe, the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),⁷⁷⁴ the Revised European Social Charter (RESC) of 1996,⁷⁷⁵ and Protocol Number 12 to the ECHR,⁷⁷⁶ are some of the major instruments whose primary purpose is, *inter alia*, to fight against unjustified discrimination in the European Union Member States. They are designed to realize the protection of human rights and to create the understanding of some of the meanings and constituents of discrimination, while encouraging all States to embrace the principle of non-discrimination. Other international instruments that aim at equality and non-discrimination include the 1966 International Covenant on Civil and Political Rights (ICCPR),⁷⁷⁷ the International Covenant on Economic Social and Cultural Rights (ICESCR),⁷⁷⁸ the Convention on the Rights of the Child (CRC),⁷⁷⁹ the Convention on the Rights of Persons with Disabilities (CRPD)⁷⁸⁰, the International Labour Organization's (ILO) particularly Convention Number 111 on Discrimination, and the Framework Convention for the Protection of National Minorities.⁷⁸¹

4.5.1 Revised European Social Charter (RESC)

The Revised European Social Charter was devised to compliment the European Convention on Human Rights but is not given equal importance by all the Nordics. Nevertheless, it is recognized as a legal instrument which can be used to protect refugees against discrimination which partly contributes to the Gap. Starting with Finland, the Revised European

⁷⁷³ UNGA Res 34/180, (CEDAW) art 1.

⁷⁷⁴ Art 14.

⁷⁷⁵ Art E

⁷⁷⁶ Council of Europe, *Protocol Number 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (adopted 4 November 2000 European Treaty Series Number 177) art 1.

⁷⁷⁷ UNGA Res 2200A (XXI) (adopted 16 December 1996, entered into force 23 March 1976) (ICCPR).

⁷⁷⁸ UNGA Res 2200A (XXI) (adopted 16 December 1996, entered into force 3 January 1976) (ICESCR).

⁷⁷⁹ UNGA Res 44/25 (*Convention of the Rights of the Child*) (adopted 20 November 1989, entered into force 2 September 1990), (CRC).

⁷⁸⁰ UNGA Res 61/106 (*Convention on the Rights of Persons with Disabilities*) (adopted 24 January 2007, entered into force 3 May 2008).

⁷⁸¹ Council of Europe, *Framework Convention for the Protection of National Minorities* (1 February 1995 entered into force 01 February 1998, European Treaty Series Number 157).

Social Charter is an important source of anti-discrimination law.⁷⁸² Currently, it is only Finland in the Nordics which has signed and ratified the Revised European Social Charter without any derogations or reservations. Individual petitions are fully accepted, and domestic courts can adjudicate cases concerning violation of the Charter.⁷⁸³ Norway, on the other hand, signed and ratified the Revised European Social Charter, but accepted only 80 of its 98 paragraphs; and the right of individual petition is accepted as from 1997, but it cannot be relied upon in domestic courts.⁷⁸⁴ However, the list of the ‘non-accepted clauses’⁷⁸⁵ does not contain fundamental articles like the right to work (Article 1), the right of migrant workers and their families to protection and assistance (Article 19), non-discrimination, equal opportunities and treatment between sexes (Article 20), and the main anti-discrimination provision (Article E). The implication is that the Revised European Social Charter is a relevant source of anti-discrimination law which complements domestic anti-discrimination laws.

Sweden, on the other hand, also ratified the Revised European Social Charter but derogated and reserved itself from, *inter alia*, Article E, the non-discrimination clause.⁷⁸⁶ Sweden went ahead and signed the Collective Complaint Procedure in 1995 and ratified it in 1998.⁷⁸⁷ Although Sweden has done much to fight against discrimination through domestic legislation and adopting directives from the European Union, etc., derogating or reserving itself from the non-discrimination article of the Charter created a situation where individuals cannot rely upon it as a legal instrument in domestic courts. Reserving and derogating from Article E of the Revised European Social Charter reduces the sources of anti-discrimination laws, further exposing refugees to vulnerabilities originating from discrimination.

⁷⁸² Signed 3 May 1996, ratified 21 June 2002.

⁷⁸³ R Hiltunen, *Country Report – Non-Discrimination – Finland – 2016* (Annex 2, Table of International Instruments 2016) 77.

⁷⁸⁴ LE McClimnas, *Country Report – Non-Discrimination – Norway – 2015* (Annex 2, Table of International Instruments) 101.

⁷⁸⁵ The Secretariat, *Report on the Non-Accepted Provisions of the European Social Charter: Norway* (European Committee of Social Rights, 11 May 2013).

⁷⁸⁶ P Norberg, *Country Report – Non-discrimination – Sweden – 2016 Country Report-Non-Discrimination Sweden-2016* (European Commission, Directorate-General for Justice and Consumers, Brussels 2016) (Annex 2, Table of International Instruments) 104.

⁷⁸⁷ P Norberg, *Country Report-Non-Discrimination Sweden-2016* (European Commission, Directorate-General for Justice and Consumers, Brussels 2016).

Finally, Denmark signed the Revised European Social Charter but has yet to ratify it, accept the right of individual petitions or ‘authorize’ individuals to directly rely upon it in domestic courts. With the exception of Finland, the Revised European Social Charter has a limited role in Nordic legal systems, even though it can be important in defending equality and social justice.

As a general observation, the definitions of discrimination tend to be worded slightly differently in the conventions and anti-discrimination treaties and in the corresponding national legislation, but substantively, the message remains the same: prohibit discrimination and promote substantive equality. In case of the International Convention on the Elimination of All Forms of Racial Discrimination, the definition of discrimination is a veritable mixture, a smorgasbord of ‘reasons for’, ‘grounds for’, ‘types of’, objectives and motives of, and consequences of discrimination. The various definitions in the Nordics’ anti-discrimination laws are also worded differently, but do not differ fundamentally from those in the International Convention on the Elimination of All Forms of Racial Discrimination and European Union anti-discrimination directives.⁷⁸⁸ But for the purposes of this thesis, finding out why refugees are generally and more frequently discriminated against in the labour market requires an extended analysis of the phenomenon of discrimination. The starting point is to discern the technicalities of the grounds on which discrimination occurs, which is discussed in the following section.

Part II

4.6 Grounds or protected characteristics

Legally, discrimination in the Nordics, and indeed elsewhere, has to be based on the grounds of a set of clearly defined grounds or protected characteristic(s). Broad areas in which discrimination should not occur include, race, religion, gender, age, etc. The list of prohibited grounds varies from country to country. In Norway, anti-discrimination legislation corresponds

⁷⁸⁸ See for example, Directive 2006/54/EC on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation OJ L204/23, 26 July 2006, which recast Council Directive 75/117/EEC of 10 February 1975 on the Approximation of the Laws of the Member States Relating to the Application of the Principle of Equal Pay for Men and Women, OJ L045, 19 February 1975 (Equal Pay Directive 75/117/EEC), Council Directive 76/207/EEC of 9 February 1976 on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions (Equal Treatment Directive 76/207/EEC) amended by Directive 2002/73/EC, Burden of Proof Directive 97/80/EEC; Directive 2000/43/EC; Directive 2000/78/EC; Directive 2006/54/EC.

to the requirements in the *EU acquis*⁷⁸⁹, even though the Equal Treatment Directive (2000/78/EC) and the Race Directive 2000/43/EC (the Anti-Discrimination Directives) are not part of the European Economic Area agreement. Norway is a member of the European Economic Agreement but not the European Union, and this relationship is beyond the scope of this thesis; however most European Union directives are easily transposed into Norwegian domestic laws.

The Norwegian Ethnic Anti-Discrimination Act of 2013 contains 12 grounds on which no one should be discriminated against except in certain circumstances. A person connected to a discriminated person is also protected if the ground is ethnicity, religion or belief. For example, no one should be discriminated against because of ethnicity, religion (belief), or other grounds like national origin, descent, skin colour and language.⁷⁹⁰ However, one of the reasons why refugees suffer from high levels of long-term unemployment is lack of fluency in the Norwegian language. If employers reject candidates because of their poor Norwegian language skills, it could raise the question of whether this is tantamount to discrimination because of language. The exception to the rule would be if the local language was a genuine determining factor of employment. The protected grounds are important because they are relied on to promote and achieve substantive equality.⁷⁹¹

Denmark and Finland have 10 protected grounds each, while Sweden has nine.⁷⁹² Norway⁷⁹³, Finland⁷⁹⁴ and Sweden⁷⁹⁵ have constitutional anti-discrimination provisions. Norway, like the rest of the Nordics, penalizes practices of discrimination.⁷⁹⁶ Denmark is unique among

⁷⁸⁹ LE McClimans, *Country Report-Non-discrimination-Norway-2015*, 7.

⁷⁹⁰ The Ethnicity Anti-Discrimination Act art 6.

⁷⁹¹ The Ethnicity Anti-Discrimination Act (2003) Chap1 s1.

⁷⁹² I Chopin and C Germaine, *A comparative analysis of non-discrimination law in Europe 2015* (A comparative analysis of the implementation of EU non-discrimination law in the EU Member States, the former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Montenegro, Norway, Serbia, and Turkey. January 2016. Based on information current as of 1 January 2015. European Commission 2016): Grounds protected on the national level in various laws, whether at the federal or regional level, 12-14.

⁷⁹³ The Constitution, as laid down on 17 May 1814 by the Constituent Assembly at Eidsvoll and subsequently amended, most recently in May 2016, art 98.

⁷⁹⁴ The Constitution of Finland of 11 June 1999 (731/1999, Amendments up to 1112/2011 included) < www.constituteproject.org/constitution/Finland_2011?lang=en > accessed 15 August 2017, art 6. See also < www.scandinavianlaw.se/pdf/52-23.pdf >.

⁷⁹⁵ The Constitution of Sweden: The Fundamental Laws and the Riksdag Act (Stockholm 2016) Chapter 1, art 2; Chapter 2 art 12.

⁷⁹⁶ The General Civil Penal Code of Norway, s135a, s349a.

the Nordic countries in that it has no constitutional provision on equality and discrimination, but nevertheless discrimination, once claimed and proved, can lead to a lawsuit because the victim can report it the police.⁷⁹⁷

4.6.1 Religion or belief as grounds for discrimination

Most resettled refugees are Muslims or from Christian denominations not affiliated with Evangelical Protestants. In Denmark, the State and the church are clearly linked through the Minister of Ecclesiastical Affairs, and most Danes belong to the '*Danske Folkkirke*'.⁷⁹⁸ The Danish constitution is clear: 'The Evangelical Lutheran Church shall be the Established Church of Denmark, and, as such, it shall be supported by the State';⁷⁹⁹ and 'The King shall be a member of the Evangelical Lutheran Church'.⁸⁰⁰ A 2016 report on discrimination included no statistical information on religious affiliations in Denmark.⁸⁰¹ However, the report mentioned that in the 1960s and 1970s, the population was 'relatively homogenous', and most Danes belonged to the Evangelical-Lutheran Church by 'conviction, tradition and/or culture'.⁸⁰² The picture changed with the influx of migrant workers and refugees.

In Finland, the Evangelical Lutheran Church of Finland has the affiliation of 73 per cent of the Finnish population, according to a 2016 report, while the second largest group as far as religion is concerned, is the Russian Orthodox Church, with an affiliation of about one per cent of the Finnish population.⁸⁰³ This figure can be contrasted with a 2008 report, which said a total of 80.6 per cent of Finns belonged to the State Church.⁸⁰⁴ The number of Finns belonging to the State Church therefore appears to have declined but remains a very significant proportion of the

⁷⁹⁷ P Justensen, *Country Report-Non-Discrimination-Denmark-2016*, 9.

⁷⁹⁸ The Danish Peoples' Church.

⁷⁹⁹ The Constitutional Act of Denmark (5 June 1953 Number 169) art I (4) < www.scandinavianlaw.se/pdf/52-22.pdf >; ('*Danmarks Riges Grundlov nr. 169 af 5 juni 1953*') (The Constitution of the Realm of Denmark, Number 169 of 5 June 1953) < www.grundloven.dk > accessed 26 October 2017.

⁸⁰⁰ Part II (6) *ibid*.

⁸⁰¹ P Justesen, *Country Report-Non-Discrimination-Denmark-2016* (Reporting Period 1 January 2015 – 31 December 2015, European Commission, Directorate-General for Justice and Consumers, Brussels 2016).

⁸⁰² *Ibid* 5.

⁸⁰³ R Hiltunen, *Country Report-Non-Discrimination-Finland-2016* (Reporting Period 1 January 2015 – 31 December 2015, European Commission, Directorate-General for Justice and Consumers, Brussels 2016).

⁸⁰⁴ K Kääriäinen, 'Religion and the State in Finland' (2011) 24 (2) *Nordic Journal of Religion and Society* 155.

population. Meanwhile the population of Muslims doubled from 30,000 to 60,000 in a period of less than 20 years;⁸⁰⁵ however, this has not proved a sudden ‘game changer’ as far as religion is concerned. The overall number remains low, and Muslims and other new arrivals from different faith backgrounds are expected to adapt, which can be very demanding and challenging on both sides.

The Evangelical Lutheran Church of Norway, on the other hand, is a ‘people’s church’ (*folkekirke*) and the King must belong to that Church, a fact that probably gives it more privileges than other religious denominations and faiths. The constitution of Norway clearly states: ‘The Executive Power is vested in the King, or in the Queen if she has succeeded to the Crown’⁸⁰⁶ and ‘The King shall at all times profess the Evangelical-Lutheran religion’.⁸⁰⁷ Furthermore, Article 16 explicitly states: ‘The Norwegian Church, an Evangelical-Lutheran church, will remain the Norwegian National Church and will as such be supported by the State.’ It is estimated that in 2015, about 79 per cent of Norwegians belonged to the state church.⁸⁰⁸

Lastly, only Sweden does not have a state church but the ‘*Svenska Kyrkan*’ (the Church of Sweden) is Evangelical Lutheran and still holds a prominent position in Swedish society. The Swedish State and church were effectively separated as recently as the year 2000.⁸⁰⁹ Per Norberg’s 2016 report noted that although Sweden was secular, it was still inclined to Lutheran traditions.⁸¹⁰ However, by 2010, ‘foreign-born’ inhabitants (‘persons who themselves are foreign-born or both of whose parents were born in another country’) made up 19.1 per cent of the Swedish population.⁸¹¹ That percentage could be statistically significant, although there is a likelihood that many of these people have or will become secular as well.

⁸⁰⁵ R Hiltunen, *Country Report-Non-Discrimination-Finland-2016*, 5.

⁸⁰⁶ The Constitution, as laid down on 17 May 1814 by the Constituent Assembly at Eidsvoll and subsequently amended, Article 3. (The English translation is not official).

⁸⁰⁷ Art 4.

⁸⁰⁸ LE McClimans, *Country Report-Non-discrimination-Norway-2015*, 5.

⁸⁰⁹ The Constitution of Sweden: The Fundamental Laws and the ‘*Riksdag*’ Act, (2016), 18.

⁸¹⁰ P Norberg, *Country Report-Non-Discrimination Sweden-2016* (European Commission, Directorate-General for Justice and Consumers, Brussels 2016).

⁸¹¹ *ibid* 5.

4.6.2 Lack of contact through religion

Religion is important as far as the Gap is concerned. Most people in the Nordics are secular but religion still plays an important role in their private spheres. People still participate in religious ceremonies that include, but are not limited to, baptism (christening), confirmation, church weddings and funerals, Christmas, Easter, etc. ‘Lucia’ is another tradition.⁸¹² Church music, including choirs and concerts, prayers, hymns, confessions, and other pastoral care services that may be important in periods of grief, for instance, are rarely shared by people of other religions. Contact between communities is important. Increased propinquity or proximity between refugees and the local population can significantly increase mutual respect as there is no way the former can exist as an independent and distinct group.⁸¹³ The lack of contact through religion may contribute to discrimination because refugees remain ‘unknown’ by the majority religious leaders and church-goers. This lack of contact in the context of faith raises the question that nationals in a position to influence policies and private decisions, including employment decisions, may, inadvertently or deliberately, make choices that affect refugees negatively. The importance of religion needs to be expounded so that its influence in the context of law is established.

As refugees are subjects of international human rights law, the Refugee Convention in particular, it makes sense to start the discussion of religion as a ground of discrimination from that Convention. The principle that religion or belief is a source of discrimination which can progress into persecution is well established in international customary law.⁸¹⁴ Religion is one of the grounds on which an asylum-seeker escaping persecution can be offered international protection.⁸¹⁵ Persecution due to religion is frequent in dictatorial, rogue and undemocratic countries where the rule of law has yet to take root.⁸¹⁶ In 2016 the then United Nations Special Rapporteur for Religion and Belief, Mr. Heiner Bielefeldt, showed how complicated it can be ‘to

⁸¹² ‘Culture and traditions of Sweden’ < <https://sweden.se/culture-traditions/lucia/> > accessed 16 August 2017.

⁸¹³ M Valenta and SP Ramet, *The Bosnian Diaspora: Integration in Transnational Communities* (Surrey 2011) 93.

⁸¹⁴ 1951 Refugee Convention art 1A (2).

⁸¹⁵ Ibid.

⁸¹⁶ UNGA, ‘Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms (Elimination of all forms of religious intolerance, Note by the Secretary-General, Interim report of the Special Rapporteur on freedom of religion or belief, 2 August 2016, A/71/269.

provide a “global map” of existing violations of freedom of religion or belief’.⁸¹⁷ He noted that some types of violations attracted wide public attention, while others were hardly known even among human rights experts.⁸¹⁸ It has also been observed that ‘the forms, motives and root causes of violations differ widely and cannot be captured adequately by “cartographic” projects, some of which try to depict degrees of violations in analogy to the height of mountains or the depth of the ocean’.⁸¹⁹ This clearly shows how difficult it is to deal with this subject within the context of law, a field that requires facts backed by evidence if any claim of discrimination because of religion is to be established. Discrimination on religious grounds which feeds into the Gap can occur as the following cases illustrate.

Norway

In Norway, discrimination because of religion or belief is prohibited by law⁸²⁰ but still occurs. Claimants are often from immigrant backgrounds, and some may also have a refugee background. The *Jæren tingrett* (Jæren Court of First Instance) found that a hairdresser’s refusal to provide services to a woman wearing a hijab amounted to discrimination because of religion.⁸²¹ It was the first case of its kind. In another case but with rather a different result, a company’s regulation on employees’ uniforms demanded that: ‘Jewellery that indicates political or religious messages may not be worn visibly while in uniform. Religious headgear and veils may not be used while wearing (B Safety Company’s) uniform’.⁸²² The legality of the regulation of a private company was questionable even though the company was responsible for security at many of the country’s airports. The tribunal found, among other things, that the regulation did not directly discriminate against employees because of religion. The tribunal relied on decisions of the European Court of Human Rights in the case of *Kurtulmus v. Turkey*,⁸²³ *Ahmet Arslan and*

⁸¹⁷ Ibid 4/22.

⁸¹⁸ Ibid 4/22.

⁸¹⁹ Part III, the Broad Range of Violations of Freedom of Religion or Belief, their Root Causes and Variables, Doc. A/71/269, s9.

⁸²⁰ Anti-Discrimination Act, Chap 2, s 6.

⁸²¹ TJARE 2016-96260 (Jæren tinghus, 9 September 2016 (Norway). The decision was going to be appealed, meaning that enforceability was still unrealistic.

⁸²² Case Number 2/2014 (Equality and Anti-Discrimination Tribunal, 14 July 2014).

⁸²³ Application Number 65500/01 (ECtHR, 24 January 2006).

Others v. Turkey,⁸²⁴ *Leyla Şahin v. Turkey*,⁸²⁵ *Dahlab v. Switzerland*,⁸²⁶ and the Danish Supreme Court in the case of *Føtex*⁸²⁷ to reach its conclusion. A prohibition on religious headwear constituted not only direct discrimination because of religion but also indirect discrimination because of gender. In this case, however, the direct discrimination was ruled lawful as it could be justified, had the legitimate objective of neutrality and was necessary given the company's role of providing airport security. The tribunal affirmed that the regulation was proportional because acceptance of the hijab could lead to the undesirable situation of a segregated workplace. Value-neutral uniform regulations could check social and religious pressures, the tribunal concluded.

Denmark

In Denmark, discrimination is prohibited on many grounds including religion.⁸²⁸ Discrimination because of religion is also specifically prohibited by the Act on the Prohibition of Discrimination in the Labour Market etc.⁸²⁹ In one case, a student who wanted to become a nutrition assistant had to leave the programme (course) prematurely because the school refused to exempt her from tasting pork, even though she was ready to touch and prepare pork dishes but without tasting them.⁸³⁰ She was later awarded EUR 10,100 by the Danish Equality Board for indirect discrimination because of her religion.⁸³¹ The reasons were, *inter alia*, that tasting pork dishes would be against the student's religion and that the school had failed to document the necessity of tasting pork as a condition of completing the education programme as a condition for becoming a nutrition assistant. The student was protected by law. Anti-discrimination laws, if well monitored and applied, can protect religious persons from the practices of discrimination.

⁸²⁴ Application Number 41135/98 (EctHR, 23 February 2010).

⁸²⁵ Application Number 44774/98 (EctHR, 10 November 2005).

⁸²⁶ Application Number 42393/98 (EctHR, 15 February 2001).

⁸²⁷ Case Number 22/2004 (Decision of 21 January 2005).

⁸²⁸ The Criminal Code of Denmark s266b.

⁸²⁹ See Consolidated Act Number 1349 of 16 December 2008 (Consolidation Act on Prohibition of Discrimination in the Labour Market, etc.).

⁸³⁰ Decision Number 213/2012 (National Equality Body: Board of Equal Treatment, 8 February 2012).

⁸³¹ P Justesen, *City Court of Holstebro: Requirement to taste food with pork constituted discrimination* (788-DK-20-2012-04.04 Flash Report 2, European network of legal experts in the non-discrimination field, 7 May 2013).

In another case, a job-seeker who was asked during an interview whether he was Muslim and how he felt about the traditional Danish sense of humour, was awarded approximately EUR 335 by the Board of Equal Treatment.⁸³² An employer is prohibited from asking about the religion of a job applicant and the question therefore constituted a violation of Section 4 of the Act on Prohibition against Discrimination in the Labour Market etc. The context (intention) was irrelevant even though the company had argued that the question was posed with no malicious intent. It was to show that the company had many nationalities and the canteen respected employees by not serving pork for religious reasons.

It should be noted that Danish judges are meanwhile prohibited from appearing or dressing in a way which could be interpreted as a manifestation of any religious or political affiliation under the amended Act on the Administration of Justice.

Sweden

Discrimination because of religion has also been observed in Sweden. One young girl who had started her primary education had to change schools because she wore a headscarf for religious reasons.⁸³³ The private school's rules prohibited the wearing or use of any type of hat or a cap during school hours. The situation was complicated because the veil/wrap (headscarf) was not comparable to a cap or a hat. Although the girl had changed schools, the Swedish National Board of Education did not accept the school's policies. It concluded that a school was supposed to be 'open to all pupils' in accordance with the Schools Act. School rules should not therefore override personal choices that included the choice of clothing, except in circumstances connected to public order or safety. Access to schooling would therefore be denied due to religious reasons if a school prohibited a pupil from wearing a headscarf, and this therefore constituted discrimination.

In another case, the Swedish Labour Court decided that it did not amount to discrimination on grounds of religion to reduce an employee's duties because, as a non-

⁸³² Decision Number 259/2012, National Equality Body: Board of Equal Treatment, 11 April 2012.

⁸³³ Decision Number (D nr 52-2006:689) of 22 May 2006. The same decision appeared in the *European Anti-Discrimination Law Review*, Number 4 (2006). See also case 2009/103 of 30 November, Equality Ombudsman Decision (Sweden), about a student who was aspiring to be a day care teacher but who, during training, wore a niqab.

conformist Lutheran, she could not fulfil a significant part of those duties.⁸³⁴ As a nurse in an old people's home fulfilling certain roles, she argued that she missed many activities relating to traditional religious feasts. Some of her roles had been taken away and her hours reduced from 68 per cent to 56 per cent, a decision she argued had deprived her of an extra job (equivalent to 12 per cent), and was discriminatory because of religion. The court rejected the claimant's arguments. No discrimination had taken place because the employer would have treated any hypothetical employee in the same way as they had treated the claimant.

In another case, a Jehovah's Witness who refused to apply for a job selling advertising space for lottery services because he did not want to work with the gambling industry had had his unemployment support stopped.⁸³⁵ The respondent had reasoned, among other things, that an individual cannot refuse to seek a job and later rely on individual conscience as a valid reason. Because the case was indirect discrimination, there developed a need to carry out the proportionality test. In this case, most Jehovah's Witnesses reject gambling, whereas most Swedes accept it. The Stockholm Municipal Court found that although the job did not require selling lottery tickets, the claimant had, nonetheless, a valid reason not to seek employment that involved facilitating gambling. As a discrimination award, he was given EUR 6,600.

Discrimination because of religion can start from unexpected circumstances. Take the example of *Equality Ombudsman v. Polop AB*,⁸³⁶ where a Muslim woman refused to shake hands with a male doctor. In response, the doctor refused to examine her. The Hässleholm Municipal Court concluded that by refusing to shake hands, the Muslim woman had practised her culture which was prompted by her religious belief. It said religion was a protected characteristic which had to be safeguarded irrespective of lack of evidence that all Muslims shared the idea. By denying her the examination, the doctor, on the other hand, had not been expressing his religious beliefs. He had also failed to accommodate a patient's religious belief, the court found.

The above cases have revealed that discrimination because of religion can occur. However, with the help of anti-discrimination laws and ombudsmen, religious discrimination can

⁸³⁴ Case 2005 Number 21 (AD 2005:21) (Swedish Labour Court, 9th February 2005). For more details of the case, see the *European Anti-Discrimination Law Review* Number 2 (2005).

⁸³⁵ Case T-10264-14, 28 December 2015: *Equality Ombudsman v. Swedish State through the National Employment Agency*.

⁸³⁶ Case T-1370-13 (*Equality Ombudsman v. Polop AB*, 14 April 2014)

be guarded and fought against. The absence of cases of discrimination from Finland does not mean that discrimination on grounds of religion or belief does not occur. The Finnish language through which most information is available, does not make research into the subject of discrimination easier.⁸³⁷

4.7 Legal definitions of religion or belief

Religion or belief is a protected ground as set out in the Ethnicity Anti-Discrimination Act of Norway, 2013. Ordinarily, religion could be seen as a set of philosophical beliefs concerned with the cause, nature and purpose of the universe, especially when considered as the creation of a superhuman agency or agencies. Within the meaning of the Refugee Convention,⁸³⁸ religion can include established institutionalized religions, systems of beliefs concerned with convictions or values about a divine or ultimate reality, or the spiritual destiny of mankind.⁸³⁹ As a fundamental human right, the right to freedom of religion and belief is enshrined in the Universal Declaration of Human Rights,⁸⁴⁰ the International Covenant on Civil and Political Rights⁸⁴¹ and the European Convention on Human Rights,⁸⁴² etc. Religious discrimination is also addressed in the EU Directive 2004/83/EC as a reason for persecution.⁸⁴³

Freedom of thought, conscience and religion becomes a matter of legal concern when a person or persons suffer a detriment because of discrimination based on religious grounds. A second way of defining religion can be linked to identity.⁸⁴⁴ A claimant can be attached to a

⁸³⁷ Finlex Data Bank <<http://finlex.fi/en/>> accessed 16 August 2017.

⁸³⁸ Art 1(A) 2.

⁸³⁹ UNHCR, *Resettlement Handbook* (2011) 86.

⁸⁴⁰ Art 18.

⁸⁴¹ Art 18.

⁸⁴² Art 9.

⁸⁴³ The Council of the European Union, Council Directive 2004/83/EC on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L304/12 art 10(1). See also CCPR General Comment Number 22 (Adopted at the Forty-eighth Session of the Human Rights Committee (on 30 July 1993 CCPR/C/21/Rev.1/Add.4) para 2.

⁸⁴⁴ A Zimmermann and C Mahler, 'Part Two General Provisions, Article 1 A, para. 2' in A Zimmermann, F Machts and J Dörschner, *The 1951 Convention Relating to the Status of refugees and its 1967 protocol: A Commentary* (Series: Oxford Commentaries on International Law, Oxford Public International Law, 2011) para 363.

group that is tied together by common beliefs and rituals.⁸⁴⁵ These could be based on common history, culture and ethnicity.⁸⁴⁶ It should, however, be noted that religion does not necessarily fall within the ambits of traditional faiths or common theological belief. Finally, religion can be regarded as a way of life, where the behaviour of a claimant is rooted in belief or conviction. Examples given are observance of religious holidays or wearing distinctive clothing. The examples could mean less to non-adherents but may be the articles of faith to adherents.⁸⁴⁷ Religion or belief is a complex subject especially in cases of overt religious symbols like wearing of the turban, kippah, hijab, etc. Refugees are more likely to experience discrimination because of their different religions and beliefs, which are usually minority faiths in their host countries.

4.7.1 Nationality or citizenship

Nationality and citizenship are two intimately intertwined concepts.⁸⁴⁸ The concepts of citizenship and lack of citizenship are central elements in national and international law.⁸⁴⁹ Membership of a nationality can be concerned with cultural, ethnic or linguistic identity; common geographical or political origins; or relationship with the population of another State. Nationality can be extended to membership of a real or perceived ethnic, religious, cultural or linguistic group defined collectively. There is no need to legally formalize the difference.⁸⁵⁰

Nationality can also be a deceptive term that can occasionally overlap with the term ‘race’, which can be directly linked to colour, descent or membership of an ethnic group.⁸⁵¹ Race and nationality are often used interchangeably as they are on a sliding scale. Refugees are often treated unequally because, even though they are legal citizens, their nationality is often equated

⁸⁴⁵ Ibid.

⁸⁴⁶ Ibid.

⁸⁴⁷ UNHCR, *Guidelines on International Protection Number 6: Religion-Based Refugee Claims Under Article 1A (2) of the 1951 Convention and/or the 1967 Protocol Relating to the Status of Refugees* (HCR/GIP/04/06, 28 April 2004). See also Case 2306989/03, Employment Tribunal, UK (*William v. South Central Ltd*).

⁸⁴⁸ Council of Europe, *Council Directive 2004/83/EC on Minimum Standards for the qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted* [2004] OJ L 304/12 (Qualification Directive), art 10 (1) C.

⁸⁴⁹ Qualification Directive *ibid* art 10(1) C.

⁸⁵⁰ Ibid art 10(2).

⁸⁵¹ Ibid 10(1)(a).

to race or ethnicity as the two concepts have a blurred relationship. They suffer an ‘ethnic penalty’ i.e. ‘the measure of disadvantage members of ethnic groups suffer in the labour market’.⁸⁵² Race is a concept which has existed for as long as humans have existed, and discrimination because of skin colour may be ‘dictated by political reasons rather than by race prejudice’.⁸⁵³

4.7.2 Discrimination based on racial or ethnic origin

Race, ethnicity and national origin are concepts that are sometimes used interchangeably. When refugees are resettled, they undeniably originate from different ‘races’ or their ethnic origin is foreign. Their mother tongue is frequently different; their skin colour may also be different because most contemporary refugees are from Africa, the Middle-East and parts of Asia. Their everyday life may be dominated by the cultural norms (mores) of their former country. Discrimination because of race, ethnicity or national origin can occur, exacerbating the Gap. The term ‘race’, on the other hand, is problematic and controversial.⁸⁵⁴ It could be the reason why the Nordics, with the exception of Denmark, do not include the term in their national anti-discrimination legislation. This is because the word itself is contestable, and overlaps with other protected grounds like ethnic origin, nationality, language, etc.⁸⁵⁵

The Norwegian Ethnic and Anti-Discrimination Act,⁸⁵⁶ for instance, mentions ethnicity, national origin, descent, skin colour and language, *inter alia*, but not race, as protected grounds. The Finnish Non-Discrimination Act avoids race and instead uses ‘ethnic or ‘national origin’.⁸⁵⁷ In Sweden, ethnicity is defined as ‘national or ethnic origin, skin colour or similar

⁸⁵² B Hepple, *Equality: The Legal Framework* (2nd edn Hart Publishing 2014) 47.

⁸⁵³ J Comas, ‘Racial Myths’ (UNESCO, Paris 1958) cited in D Keane, *Caste-based Discrimination in International Human Rights Law* (Ashgate 2007) 71.

⁸⁵⁴ Council Directive 2000/43/EC, Recital 6, the European Union categorically denied the belief in existence of separate human races theories.

⁸⁵⁵ Chopin and Germaine (2015), 13.

⁸⁵⁶ *Act Relating to a Prohibition against Discrimination on the Basis of Ethnicity, Religion, and Belief* (Norway), adopted 21 June 2013 entered into force 1 January 2014 Act Number 60) s6.

⁸⁵⁷ Ministry of Justice, *Non-Discrimination Act* (1325/2014) (Finland), Adopted 30 December 2014, Entry into force: 1 January 2015) s6 (1).

circumstances’.⁸⁵⁸ It is only Denmark that includes ‘race’ as a ground for protection against discrimination.⁸⁵⁹ This could probably be explained by the fact that Denmark adopted or implemented the European Union Equal Treatment Directive 2000/43/EC, which includes the word ‘race’. The directive is part of Danish law.

Much as the term ‘race’ is eschewed in many anti-discrimination acts, it is nonetheless the focus of the United Nations Racial Discrimination Convention (ICERD)⁸⁶⁰ which Denmark (1966, 1971), Finland (1966, 1970) Norway (1969, 1970), and Sweden (1966, 1971) signed and ratified respectively, without any reservations regarding the equality and non-discrimination clauses. The rights of individual petitions are accepted, but the Convention cannot directly be relied on in domestic courts without interpretation.

In Norway, the Ethnicity Anti-Discrimination states clearly that the ‘International Convention on Elimination of All Forms of Racial Discrimination (ICERD) of 21 December 1965 shall apply as Norwegian law’.⁸⁶¹ But as noted by McClimans, the incorporation of the ICERD into the Ethnicity Anti-Discrimination Act of 2013 but not into the Human Rights Act made it impossible for the ICERD to ‘prevail over other statutory provisions in case of conflict, but rather this has to be decided through interpretation’.⁸⁶² The European Convention on Human Rights together with other Conventions mentioned therein ‘shall have the force of Norwegian law as far as they are binding’.⁸⁶³ This means that refugees, and indeed any person who may be discriminated can appeal to the European Convention on Human Right,⁸⁶⁴ the non-discrimination clause. However, courts will have a greater margin of appreciation. But still, it is not the only source of anti-discrimination laws in the Nordics.

⁸⁵⁸ *Discrimination Act* (2008:567) [Sweden] (adopted 5 June 2008 entered force 1 January 2009, Amendments Incorporated up to and including SFS 2014:958. Transitional Provisions Omitted) s5 (3).

⁸⁵⁹ *Act on the Prohibition of Discrimination in the Labour Market, etc.* (adopted 24 May 1996, entered into force 1 July 1999, latest amendment 1 January 2016).

⁸⁶⁰ Convention on Elimination of All Forms of Racial Discrimination.

⁸⁶¹ *The Ethnicity Anti-Discrimination Act* s5.

⁸⁶² LE McClimans, *Country Report-Non-Discrimination-Norway-2015* (Reporting period 1 January 2014 – 31 December 2014, European Commission, Directorate-General for Justice and Consumer, Brussels 2015) 6.

⁸⁶³ *The Human Rights Act* [Norway] Number 30, 21 May 1999) s2.

⁸⁶⁴ Article 14.

4.7.3 Other meanings of the concept of race

All European countries have legislation that lays down grounds on which such a practice of discrimination on racial grounds must not be accepted or tolerated. The definition of race or ethnicity is sometimes cleverly eschewed but it might involve ‘the belief that a ground such as race... national or ethnic origin, justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons’.⁸⁶⁵ Race cannot easily be defined because the term itself is fluid, constantly changes and may carry a multitude of distinct meanings at different points in history.⁸⁶⁶ It is historically determined, socially constructed and has hierarchal arrangements.⁸⁶⁷ Borrowing the United Kingdom’s example, race is defined as comprising colour, nationality and ethnic or national origin.⁸⁶⁸ Race can include an entire group of people sharing the same culture, language, history or similar identities such as Europeans; and it can also be interpreted as having or consisting of real or perceived ‘distinctive ethnic characteristics’.⁸⁶⁹

Race becomes relevant in national as well as in international law if it is used as a source of prejudice against an individual or groups of individuals to create racial disadvantage.⁸⁷⁰ In *Beyene v JDA International Ltd*,⁸⁷¹ the claimant, a black man, accused his white colleague of having repeatedly used the words ‘my nigga’. The tribunal concluded that the defendant was guilty of racial harassment even if it was the claimant who had first used the words. The context where the defendant had no intention to offend the claimant was irrelevant. The tribunal further reasoned: ‘the phrase is such an insulting phrase to use towards a black person that [it] could not

⁸⁶⁵ *Sejdic and Finci v. Bosnia and Herzegovina* Application Numbers 27996/06 (ECtHR 22 December 2009) para 23.

⁸⁶⁶ E Howard, *Law, and the Wearing of Religious Symbols: European Bans on the Wearing of Religious Symbols in Education* (Routledge 2012).

⁸⁶⁷ *Ibid.*

⁸⁶⁸ Equality Act 2010 s9.

⁸⁶⁹ UNHCR, *Resettlement Handbook* (Geneva 2011) 86.

⁸⁷⁰ B Hepple, *Equality: The Legal Framework* (2nd edn Hart Publishing 2014) 46.

⁸⁷¹ Case Number 2703297/11 (24 October 2012), Employment Tribunal (UK).

conceive of any circumstances where its use would not violate dignity and create a degrading, humiliating or offensive environment'.⁸⁷²

It also amounted to racial harassment in the case of *Henry v Ashtead Plant Hire Co Ltd*⁸⁷³ when, on a single occasion, a younger white colleague used the word 'nigger' on an older black man. Even if the word had been 're-appropriated' by some black rap music, its use in the context was unacceptable as it had injured the claimant's feelings. The claimant was awarded £3,500 (about EUR 5,300).⁸⁷⁴ The use of the word in front of another employee and failure by the employer to provide appropriate damage had compounded the case, so reasoned the equality tribunal. In the case of *Sejdic and Finci v. Bosnia and Herzegovina*,⁸⁷⁵ the Court viewed the notion of race as being rooted in the idea of biological classification of human beings into sub-species on the basis of morphological features like skin colour or facial characteristics.

Much as race is acknowledged in international law and many conventions, it can be problematic to successfully convince a jury that discrimination because of race occurred and that the plaintiff therefore suffered a detriment. In almost all communities, the belief that some people are 'inferior' and that the observable differences can causally be linked to biological or genetic factors, is persistent and can result in prejudices.⁸⁷⁶ Science has however rejected categorising human diversity using 'racial' categories like Africans, Eurasians (including Native Americans) and other major sub-divisions.⁸⁷⁷ Such concepts are obsolete. They belong to the 18th century as they were used to justify slavery and other forms of suppression. 'Perception of morphological differences may erroneously lead us to infer substantial underlying genetic differences.'⁸⁷⁸ A different skin colour, body morphology, etc., can sometimes be a proxy for tenuous anxieties between member of a society or country.

⁸⁷² I Chopin and C Germaine, *A comparative analysis of non-discrimination law in Europe 2016* (European network of legal experts in gender equality and non-discrimination, the 28 EU Member States, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Montenegro, Norway, Serbia, and Turkey compared, Based on information current as of 1 January 2016. European Union 2016) 52.

⁸⁷³ Case Number 3202933/11 (5 November 2012) Employment Tribunal, UK.

⁸⁷⁴ I Chopin and C Germaine, *A Comparative analysis of non-discrimination in Europe 2016* *ibid* (n 872).

⁸⁷⁵ Applications Numbers 27996/06 and 34836/06 (ECtHR 22 December 2009).

⁸⁷⁶ B Hepple *ibid* (n 870).

⁸⁷⁷ UNESCO, *Declaration of Schlaining against Racism, Violence, and Discrimination* (1995), (The Declaration of Schlaining 1995).

⁸⁷⁸ The Declaration of Schlaining *ibid* para 11.

However, modern biological molecular genetics and other state-of-the-art scientific mathematical models of population genetics have found the definition of race to be inadequate and old-fashioned in the face of what is known about DNA, including genes and their different alleles.⁸⁷⁹ In *Sejdić and Finci v. Bosnia and Herzegovina* case, race and ethnicity are two concepts that are related but:

‘...Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies on the basis of morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked in particular by common nationality, religious faith, shared language, or cultural and traditional origins and backgrounds...’⁸⁸⁰

Further, in the case *D.H. and Others v. The Czech Republic*,⁸⁸¹ the view of race according to the United Nations Educational, Scientific and Cultural Organization (UNESCO) was further stressed: ‘all human beings belong to a single species and are descended from a common stock’; noting that all humans were ‘born equal in dignity and rights and all form an integral part of humanity’. In short, differences based on biological theories of race have been proved wrong; however, they still play a role in some people’s minds, which may contribute to discrimination because of race or ethnicity.

4.7.4 The dilemma of multiple discrimination

Multiple discrimination is usually the simultaneous violation of protected characteristics by a prohibited conduct whereby each incidence of discrimination occurs on one ground at a time, sometimes called simultaneous discrimination.⁸⁸² All the Nordics have anti-discrimination legislation. There are also equality bodies (ombudsmen, courts and tribunals) and civil courts that handle discrimination cases. The protected grounds are similar but not identical. Norway, for instance, extends protection to part-time and migrant workers. Generally, the position of

⁸⁷⁹ Application Numbers 27996/06 and 34836/06 (ECtHR 22 December 2009) para 43.

⁸⁸⁰ Ibid.

⁸⁸¹ Application Number 57325/00 (ECtHR 13 November 2007) para 102.

⁸⁸² E Howard, ‘Multiple Discrimination in Law’. Paper presented at the ‘Think Equal, Symposium on Multiple Discrimination’, 1 November 2011, National Commission for the Promotion of Equality (NCPE), Malta < <https://www.um.edu.mt/library/oar/handle/123456789/10909> > accessed 16 August 2017. See also M Sargeant, *Discrimination and the Law* (2nd edn Routledge 2018) 10.

additive,⁸⁸³ inter-sectional⁸⁸⁴ or multiple discrimination in the Nordics poses conceptual and legal problems. For refugees, the likelihood of suffering discrimination on combined grounds is great, because they are likely to possess more protected characteristics than most nationals, which increases chances of discrimination.

However, there are no special laws dealing with multiple discrimination in the Nordics. In Finland, multiple grounds are separated, as in a case heard by the Oulu District Court, where gender discrimination was separated from disability discrimination although both occurred simultaneously.⁸⁸⁵ In Denmark too, issues involving multiple discrimination are dealt with separately.⁸⁸⁶ Norway also has no specific rules to deal with the prohibition of multiple discrimination. However, in 2012, the Norwegian Ombud dealt with 12 cases categorized as multiple (cross grounds, multiple grounds) discrimination.⁸⁸⁷ In Sweden, multiple discrimination cases have been dealt with by the Swedish Labour Courts where age, gender, ethnic and sexual harassment discrimination have overlapped each other.⁸⁸⁸

One important observation is that each country decides what to include in or exclude from the list of protected grounds.⁸⁸⁹ Generally, multiple discrimination is attributed to many causes connected to protected grounds.⁸⁹⁰ There are certain situations when a person of a certain gender (woman) who is for example black (race, ethnicity) is discriminated against because she is also disabled, overweight, pregnant, old, etc. Refugees can suffer from multiple discrimination to an appreciable degree. They can be rejected because they are ‘aggressive’, and ‘untrustworthy’ men (gender/sex), have a different religion (Muslims or Christians but not Evangelical Protestants), have non-European surnames (racial or ethnic origin), have poor local language skills, etc. It should also be noted that being *black* and *being* a woman may be

⁸⁸³ M Sargeant *ibid* 11.

⁸⁸⁴ *Ibid* 11-12.

⁸⁸⁵ S13/536, 483/23.10.2014 (Rovaniemi Appeal Court, 23 October 2014).

⁸⁸⁶ P Justensen ‘*Country Report-Non-Discrimination-Denmark-2016*’, 8.

⁸⁸⁷ LE McClimans, *Country Report-Non-discrimination-Norway-2015*, 36.

⁸⁸⁸ Norberg (2016) 33-4.

⁸⁸⁹ A McColgan, *Discrimination, Equality, and the Law* (Hart Publishing 2014) 38.

⁸⁹⁰ E Ellis and P Watson, *EU Anti-Discrimination Law* (2nd edn OUP 2014) 156.

classified as composite (a *black woman*) and becomes intersectional discrimination, as a new ground of discrimination is present.⁸⁹¹ Multiple discrimination is loaded with numerous intricacies and nuances because it is hard to make provision for intersectional discrimination. Therefore, the Nordics prefer to treat each ground of discrimination on its own, even where grounds are concomitant, overlap or reinforce each other. This thesis can, however, highlight a few conceptual issues involved in multiple discrimination. A halt to multiple discrimination, whatever name it is given, is necessary now.

4.7.5 Gender, age, disability, sexual orientation and more

Gender commonly refers to either men or women. A refugee, as any other person, can be discriminated because of his or her specific gender. A woman with a refugee background can specifically be discriminated against not only because of her gender, but because of pregnancy and maternity. Age can also be a ground for discrimination. Refugees grow older while still in the process of re-education, retraining or participating in apprenticeships that result in no employment opportunities. Refugees, in addition, often get trapped in dead-end jobs which the native-born workforce circumvent for various reasons. Such jobs are theoretically easily available, mostly on temporary contracts and are usually taken by refugees as a last resort. They could perhaps have suffered discrimination in other sectors or specific job categories, for example, decision-making positions. Wages in these dead-end jobs are stubbornly low, and are not commensurate with the cost of living. Refugees get trapped and thus the Gap is created and perpetuated.

Other refugees can be discriminated against because of disability.⁸⁹² Discrimination is a huge and complex subject. This thesis seeks to highlight only a few protected characteristics and areas of prohibited conduct in order to demonstrate how they apply to refugees who may be discriminated against in various ways at various points of their lives. Discrimination is not hypothetical. The necessity to combat it has resulted in various anti-discrimination laws and the formation of specialized bodies (e.g. ombudsman). Ordinary courts and tribunals are also active in combating it. But how effective those bodies are, especially in the area of indirect

⁸⁹¹ Ibid.

⁸⁹² See, for example, UNGA, RES/61/106 (adopted 24 January 2007).

discrimination that operates covertly or undercover, is an issue on its own. This thesis now moves on to explore the forms of prohibited conduct through which discrimination occurs.

4.5 Forms of prohibited conduct

There are four main forms of conduct (behaviour) that are prohibited by discrimination laws. These are: i) direct discrimination; ii) indirect discrimination; iii) harassment and; iv) victimization. Either in combination or on their own, the forms, once proven, can result in cases of ‘civil wrongs’, punishable by society.⁸⁹³ An allegation of discrimination can become a proven case of discrimination if it is assessed as direct,⁸⁹⁴ indirect,⁸⁹⁵ harassment⁸⁹⁶ or victimization, in the context of the European Union. In the Nordics, Norway, as a non-EU Member, has an unclearly articulated special relation with the relevant directives (2000/43 and 2000/78), even though the two have not been officially transposed into Norwegian anti-discrimination laws.⁸⁹⁷ In one case, Norway’s highest court and the court of final instance noted that:

‘Although there is no legal commitment to incorporate the Employment Equality Directive in national law, it is according to established practice from the Supreme Court that the regulations of the Working Environment Act is to be interpreted and implemented in accordance with the Employment Equality Directive.’⁸⁹⁸

The facts of the case were similar to those in the Grand Chamber of the European Court of Justice (ECJ) ruling in *Prigge and Others*,⁸⁹⁹ where it was emphasized ‘that the standards of the Working Environment Act shall be interpreted to be compatible with the Employment Equality Directive’.⁹⁰⁰ This means that EU anti-discrimination directives are important in Norway even though they have not been officially added to Norwegian statutes. The anti-discrimination laws in the rest of the Nordic countries are similar in many ways, but not wholly identical.

⁸⁹³ B Hepple, *Equality: The Legal Framework* (2nd Hart Publishing 2014) 67.

⁸⁹⁴ Directive 2000/78/EC art 2(a); E Ellis and P Watson, *EU Anti-Discrimination Law* (2nd edn OUP 2014) 143.

⁸⁹⁵ Directive 2000/78/EC, Art 2(b); Art 2(1) (b) Directive 2006/54/EC art 2(1) (b).

⁸⁹⁶ Art 2 (3) of Directive 2000/78/EC.

⁸⁹⁷ LE McClimans, *Country Report-Non-discrimination-Norway-2015*.

⁸⁹⁸ Case RT-2012-219 (Supreme Court of Norway).

⁸⁹⁹ Case C-447/09 (*Reinhard Prigge and Others v. Deutsche Lufthansa AG*) (13 September 2011) para 46.

⁹⁰⁰ LE McClimans, *Country Report-Non-discrimination-Norway-2015*, 7.

4.5.1 Meaning of direct discrimination

In Norway, unlawful ‘direct differential treatment’ means ‘an act or omission that has the purpose or effect that a person or an undertaking is treated worse than others in the same situation, and that it is due to ethnicity, religion or belief’.⁹⁰¹ Discrimination is not unlawful if: i) it has an objective purpose; ii) it is necessary to achieve the purpose and; iii) the negative impact of differential treatment on the person or persons whose position will worsen is reasonably proportionate in view of the intended result.⁹⁰² Discrimination can be justified if it does not violate the requirements for ‘lawful differential treatment’⁹⁰³ and ‘positive differential treatment’.⁹⁰⁴

In Sweden, section 4(1) of the Discrimination Act⁹⁰⁵ defines direct discrimination as: ‘someone is disadvantaged by being treated less favourably than someone else is being treated, has been treated or would have been treated in a comparable situation, if this disadvantaging is associated with sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age’.

In Finland, ‘discrimination is direct if a person, on the grounds of personal characteristics, is treated less favourably than another person was treated, is treated or would be treated in a comparable situation’.⁹⁰⁶

The Danish Consolidation Act on Prohibition of Discrimination on the Labour Market etc.,⁹⁰⁷ prohibits direct discrimination, which ‘shall be taken to occur where one person is treated less favourably than another is being, has been or would be treated in a comparable situation, on the

⁹⁰¹ Act relating to a prohibition against discrimination on the basis of ethnicity, religion, and belief (the Ethnicity Anti-Discrimination Act) s6.

⁹⁰² The Ethnicity Anti-Discrimination Act *ibid.*

⁹⁰³ *Ibid* s7.

⁹⁰⁴ *Ibid* s8.

⁹⁰⁵ Ministry of Culture (Sweden), *Discrimination Act (2008:567)*, Amendments incorporated up to and including SFS 2014:958. Transitional provisions omitted < www.government.se/4a788f/contentassets/6732121a2cb54ee3b21da9c628b6bdc7/oversattning-diskrimineringslagen_eng.pdf > accessed 6 November 2017.

⁹⁰⁶ Non-Discrimination Act (1325:2014) s10 < www.finlex.fi/en/laki/kaannokset/2014/en20141325.pdf > accessed 6 November 2017.

⁹⁰⁷ Denmark, *Consolidation Act Number 1349*, 16 December 2008 s1 (1).

grounds of race, colour, religion or belief, political opinion, sexual orientation, age, disability or national, social or ethnic origin.

When discrimination is direct, it means that because of one or more of the protected characteristics, an individual is treated less favourably than someone who does not share that characteristic is being, has been or would be treated in a comparable situation. Essentially, direct discrimination normally involves ‘overt’ conduct carried out against one of the protected characteristics, but this is not necessarily always the case.⁹⁰⁸ Differentiating direct (‘overt’) discrimination from ‘indirect’ (‘disguised’) discrimination is problematic because, most perpetrators frequently disguise their acts (of direct discrimination) while indirect discrimination is often covert.⁹⁰⁹ Direct discrimination can be ‘both overt and covert’.⁹¹⁰ In simple terms, direct discrimination requires that a claimant be treated less favourably than someone else, the actual or the hypothetical comparator. No shared characteristics are necessary to prove that it did occur. No material differences in circumstances between the claimant and the comparator need to be established. For example, if a sight-impaired man applies for a job as a computer operator, he must be compared to another man who is not sight-impaired, for example, a non-disabled man or another man with a different disability who also applies for the same job as a computer operator.⁹¹¹ When it comes to refugees, direct discrimination is hard to prove. For example, if refugees make multiple job applications but are never called for interview, the rejection cannot be considered as tantamount to direct discrimination.

4.5.2 Discrimination by association

When discrimination is ‘by association’,⁹¹² it can be direct as well as indirect, depending on the circumstances. Under this form of discrimination, a person is discriminated against because of his or her association with a person who is covered by one of the protected grounds,

⁹⁰⁸ E Ellis and P Watson, *EU Anti-Discrimination Law* (2nd edn OUP 2014) 144.

⁹⁰⁹ Ibid.

⁹¹⁰ Ibid 145.

⁹¹¹ See *Bullock v. Alice Ottley School* [1993] IRLR 564; *Wakeman v. Quick Corporation* [1999] IRLR 424.

⁹¹² E Ellis and P Watson *ibid* (n 710) 146; A Emir, *Selwyn's Law of Employment* (19th edn OUP 2016) 119.

as in the case of *Coleman v. Attridge Law*.⁹¹³ The Grand Chamber found that, although the woman did not have a disability, she had suffered a detrimental treatment by her employer. The court reasoned that even though it was not following the grounds mentioned in Article 1 of the Framework Directive,⁹¹⁴ ‘the principle of equal treatment enshrined in that directive in that area applies not to a particular category of person but by reference to the grounds’ already mentioned.

In a very similar case but with rather a dissimilar outcome, the Supreme Court of Denmark, in case *HR – 151/201*,⁹¹⁵ rejected a claim that the treatment of a woman who had been dismissed from her job because of a long-term absence of 14 months constituted indirect discrimination because her son had a disability (ie discrimination by association). The court went on to question the above case, *Coleman v. Attridge Law* and another one,⁹¹⁶ both from Court of Justice of the European Union (CJEU). At the time of writing, the case was still ‘unsettled’ and unclear: the correct understanding of the Employment Directive in this regard is neither clear nor settled’.⁹¹⁷ It was therefore problematic to treat the case as indirect discrimination because of the association of an employee to a child with a disability (Asperger’s syndrome in this case). In another case from the United Kingdom, in *EAD Solicitors LLP v. Abrams*,⁹¹⁸ the concept of discrimination by association was extended to cover a company that suffered detrimental treatment due to discrimination because it associated itself with a person with a protected characteristic. In this case, it was ‘associative age discrimination’. The Court noted that, since any person could suffer detrimental treatment, the same could be true of any legal entity and all should be protected from unlawful discrimination. A company can be boycotted because, *inter*

⁹¹³ C-303/06, ECR I-5603 (CJEU 2008). For further comments and the impact of the case on discrimination law, see comments from Hervey, Reeves, Rodgers, Riding and Roberts, Case C-303/06 *Coleman v. Attridge Law and Steve Law*, Judgment of the ECJ 17 July 2008 or Judgment of the Employment Tribunal, London, 30 September 2008, (2009) 31 (3) *Journal of Social Welfare & Family Law*.

⁹¹⁴ European Union Directive 2000/78/EC Establishing a General Framework for Equal Treatment in Employment and Occupation [2000] L 303/16, *Official Journal of the European Union*, 0016 – 0022.

⁹¹⁵ P Justensen, Denmark, Case *HR-98/2015*, *Supreme Court ruling on disability discrimination and dismissal* (News Report, 99-DK (2015) European network of legal experts in gender equality and non-discrimination < www.equalitylaw.eu/downloads/3838-denmark-supreme-court-ruling-on-disability-discrimination-and-dismissal-pdf-71-kb > accessed 06 October 2016).

⁹¹⁶ Case C-83/14 (*CHEZ Razpredelenie Bulgaria AD*) [16 July 2015].

⁹¹⁷ P Justesen, *Supreme Court ruling on discrimination by association* (Denmark, News Report, European network of legal experts in gender equality and non-discrimination, 25 May 2016), Supreme Court, Case *HR-151/2015*, judgment of 27 April 2016.

⁹¹⁸ UKEAT/0054/15

alia, it gives employment opportunities to a workforce including ethnic minorities, people with disabilities or people who are homosexual (groups which may in some circumstances be shunned by certain sub-contractors and potential customers), supports an unpopular political party, or staunchly follows certain religious ethical beliefs.

4.5.3 Perceptive and deterred discrimination

Direct discrimination can also be described as perceptive.⁹¹⁹ Perceptive discrimination occurs when a person is treated less favourably because of the belief (perception) that the concerned person has a protected characteristic. If a person with a ‘foreign-sounding’ name applies for a job and is rejected by the employer because the person is perceived to be from, say, an unpopular country (one seen a source of terrorism) or continent (war-ravaged, poor and developing⁹²⁰), etc., the person suffers a detriment due to perceptive discrimination. Perceptive discrimination is relevant to refugees as almost all have ‘foreign-sounding’ names, they come from distant countries and their religion is often different. In other incidents, a person can be deterred from applying for a job if an employer gives an indication that a person with a protected characteristic will not be considered for the concerned post. This is known as deterred direct discrimination.⁹²¹

4.6 Meaning of indirect discrimination

In the Norwegian context, indirect discrimination is synonymous with ‘indirect differential treatment’.⁹²² It refers to ‘any apparently neutral provision, condition, practice, act or omission that results in persons being put in a worse position than others, and that occurs on the basis of ethnicity, religion or belief.’⁹²³ Indirect discrimination results from a policy, provision,

⁹¹⁹ A Emir, *Selwyn’s Law of Employment* (19th edn OUP 2016) 120.

⁹²⁰ P Bevelander *et al.*, *Scandinavia’s Population Groups Originating from Developing Countries: Change and Integration* (TemaNord 2013:561 Nordic Council of Ministers 2013) 80. More immigrants than the total population were inactive (not working, seeking employment, not attending any form of education or training course).

⁹²¹ A Emir, *ibid* (n 919) 120.

⁹²² *The Ethnic Non-Discrimination Act Number 60* (21 June 2013, s6.

⁹²³ *Ibid*. For Sweden, see *The Discrimination Act* (2008:567) s4 (2).

practice, etc., which fail to offer equal treatment to persons with a protected characteristic such as race, gender, age, etc.

In Finland, indirect discrimination is defined as a situation where ‘... an apparently neutral rule, criterion or practice puts a person at a disadvantage compared with others as on the grounds of personal characteristics, unless the rule, criterion or practice has a legitimate aim and the means for achieving the aim are appropriate and necessary’.⁹²⁴

In Denmark, indirect discrimination is defined as follows:

‘...shall be taken to occur where an apparently neutral provision, criterion or practice would place persons of a particular race, colour, religion or belief, ... at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary’.⁹²⁵

In Sweden, indirect discrimination is prohibited and is defined as meaning:

‘...that someone is disadvantaged by the application of a provision, a criterion or a procedure that appears neutral but that may put people of a... certain ethnicity, ...certain religion or other belief, ...or a certain age at a particular disadvantage, unless the provision, criterion or procedure has a legitimate purpose and the means that are used are appropriate and necessary to achieve that purpose’.⁹²⁶

By and large, indirect discrimination is often covert, surreptitious and hard to pin down. A claim of indirect discrimination may emanate from a seemingly innocuous measure, policy or individual decision, among other things, which may be applied systematically but causes an individual or groups of individuals to suffer a detriment. It can be compared to brightly coloured mushrooms which, in many ways, look innocuous, innocent and immaculate on the surface, but may contain deadly poisons. Practices of indirect discrimination contribute to the Gap’s persistence and intractability. The seeming covertness of policies, actions, measures and regulations, etc., makes it problematic to find solutions to it.

One of the challenges in alleged indirect discrimination cases is to confirm the unpropitious effects. Furthermore, the disadvantage suffered must not merely be anticipatory.

⁹²⁴ *The Non-Discrimination Act 1325/2014*, s13.

⁹²⁵ *The Consolidation Act on Prohibition of Discrimination on the Labour Market etc.*, s1(3).

⁹²⁶ *Discrimination Act (2008:567)* s4 (2).

Finally, the unfavourable treatment must be causally related to the genesis of the protected characteristic and the ground for the claim, even by association.

A claim of indirect discrimination may assess first whether a practice, provision or criterion, etc. is discriminatory towards a larger proportion of the affected person or groups of persons. For example, are female refugees more indirectly discriminated against than women from the majority population? What is the situation of male refugees compared with men from the majority population? Can nationals and immigrants without a refugee background be the appropriate comparators? Should the comparison be between refugees from the same country, continent, or religion, and should they be from the same gender and age background, etc.? Decisive factors in this regard that may work against a claim of indirect discrimination can include proof of objective justification (the means used to achieve a legitimate aim), proportionality⁹²⁷ and necessity. Striking ‘a fair balance between the demands of the protection of the individual’s fundamental rights’ is not so easy it may be wished.⁹²⁸ Reversing the burden of proof can be an appropriate relief to claimants but again, the facts must be convincing.

4.6.1 Harassment (instruction to discriminate or harass), retaliation or victimization

In Norway, harassment means ‘acts, omissions or statements that have the effect or purpose of being offensive, frightening, hostile, degrading or humiliating and grounds on which harassment must not occur are ethnicity, religion and belief’.⁹²⁹ In a case of Sweden, harassment is defined as ‘conduct that violates a person’s dignity’... and the protected grounds are ‘discrimination because of ... ethnicity, religion or other belief... or age’.⁹³⁰ In Denmark too, harassment is prohibited.⁹³¹ In Finland, harassment is defined as ‘the deliberate or de facto infringement of the dignity of a person... and the reason being the prohibited grounds of discrimination’.⁹³²

⁹²⁷ The concept is well-discussed by Jason in J NE Varuhas, *Damages and Human Rights* (Hart Publishing 2016) 336.

⁹²⁸ Ibid.

⁹²⁹ *The Ethnic Anti-Discrimination Act Number 60* (21 June 2013) s 9.

⁹³⁰ *Discrimination Act (2008: 567)* s 4(4).

⁹³¹ *Consolidation Act Number 1349*.

⁹³² *Non-discrimination Act (1325/2014)* s14(1).

An employer can be liable in case of failure to take action in a situation where an employee is subjected to harassment.⁹³³ Harassment can sometimes take the form of ‘instructions to discriminate.’⁹³⁴ In Finland, this is called an instruction or order to discriminate and it constitutes discrimination *per se*.⁹³⁵ In Norway, ‘instructions’ to harass, discriminate or engage in retaliatory actions are seen as a form of discrimination.⁹³⁶ The Swedish version is more precise.⁹³⁷ Accordingly, instructions to discriminate can be due to direct or indirect discrimination, inadequate accessibility and harassment. A person ‘in a subordinate or dependent position relative to the person who gives the orders...’ can be held liable for discrimination once such instructions to harass are fulfilled.⁹³⁸

Victimization or retaliation could involve subjecting a person to a detriment because the person has a protected characteristic. The Norwegian Ethnic Anti-Discrimination Act of 2013⁹³⁹ prohibits any form of retaliation against any person ‘who has submitted a complaint regarding breach of’ the Anti-Discrimination Act, except in cases where a person acts in a manner deemed grossly negligent. Anyone who refuses to follow instructions to, for example, harass, or refuses to participate in retaliation and harassment, is also protected. Generally, it can be seen as ‘less favourable treatment connected with a person having taken action referable to the anti-discrimination enactments’⁹⁴⁰. For more information on victimization, see Aileen McColgan.⁹⁴¹

The extent to which harassment, instructions to discriminate and retaliation affect refugees more than any other group in society is difficult to analyze with surgical precision. However, common sense has it that people with different religious beliefs, cultural background and other mores, can be a target for harassment and victimization if employed. Many may not be hired because management may fear such a move would prove too controversial, and could

⁹³³ Ibid s14(2)

⁹³⁴ *Consolidation Act Number 1349* s1(5)

⁹³⁵ *The Non-discrimination Act 1325/2014* s 8(2).

⁹³⁶ *The Ethnic Anti-Discrimination Act* s11 and 12.

⁹³⁷ *Discrimination Act (2008: 567)* s4 (6).

⁹³⁸ Ibid.

⁹³⁹ s10.

⁹⁴⁰ K Monaghan, *Equality Law* (OUP 2007) 9.

⁹⁴¹ A McColgan, *Discrimination Law: Text, Cases and Materials* (2nd edn Hart Publishing 2005) 64 -72.

trigger anger from the existing and/or unionized employees who wish to protect themselves against outside competition, for instance. In the Insider versus Outsider theory,⁹⁴² organized employees (insiders) can effectively harass newcomers (outsiders) as a way to protest against management decisions to hire foreigners as these overseas workers may, sometimes erroneously, be accused of collaborating with management to undercut wages.⁹⁴³

4.6.1 Stereotypes and labelling

Discrimination becomes ‘morally unacceptable’ if a person suffers because he/she is treated less favourably than others because of a consideration which is ‘morally irrelevant’,⁹⁴⁴ for example, colour or language, etc. Discrimination is deeply embedded in indefensible prejudices, customs and other practices which see some persons as weak, unattractive, violent, unreliable or inferior, etc., and therefore incapable or dangerous, and who will therefore not easily be accepted by others (for example, fellow workers, customers), etc. A stereotype is a ‘standardised image’,⁹⁴⁵ where generalized attributes are assigned to all members belonging to that group. Such attributes are assumed to be self-perpetuating or fixed, and cannot therefore change even in contextual terms.

Persons with refugee backgrounds are often associated with trauma irrespective of factors such as the length of time spent in the traumatizing situation or their capacity to cope with their new environment. Refugees as ‘fortune-hunters’ is an example of a standard image given to all refugees, irrespective of their reasons for escaping persecution. In his paper on how the ‘complex and contested’ label of ‘refugee’ [stereotypes in this case] is formed and transformed by ‘the political, the populist, the bureaucratic, the self’, *inter alia*, Roger Zetter convincingly showed that both ‘regulatory and bureaucratic processes’ work simultaneously to ‘reproduce and reflect a political discourse of alienation and resistance’.⁹⁴⁶

⁹⁴² A Lindbeck and DJ Snower, ‘Insiders versus Outsiders’ (2001) 15 (1) *Journal of Economic Perspectives* 165.

⁹⁴³ Ibid.

⁹⁴⁴ D Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd edn OUP 2002) 135-9 in E Ellis and P Watson, *EU Anti-Discrimination Law* (2nd edn OUP 2012) 2.

⁹⁴⁵ M Sargeant, *Discrimination and the Law* (2nd edn Routledge 2018) 6.

⁹⁴⁶ R Zetter, ‘More Labels, Fewer Refugees: Remaking the Refugee Label in an Era of Globalization’ (2007) 20 (2) *Journal of Refugee Studies* 172.

Although Zetter was referring to resistance to refugee claims, the observation is nonetheless relevant to the resistance refugees meet in the labour market and in services provided by the States. It is possible that the Gap is not merely coincidental and cannot be blamed only on refugees' initial vulnerabilities and bad business cycles characterized by low rates of investment and consumption and high rates of unemployment. For Zetter, although the labelling process shows an interplay of confusions and 'overlapping strands', it apparently shows that 'legitimate and objective processes are in fact pernicious tools which fracture the claim to fundamental human rights'.⁹⁴⁷

Given that refugees are asylum seekers at one time, it may be useful to consider how the word asylum came about and how it was transformed into a negative label to be resisted. The word 'asylum', noted Marfleet, is originally from the Greek '*sulon*', meaning pillage; when a negating prefix 'a' is added, it becomes a place in which pillage or plunder is forbidden.⁹⁴⁸ People protected at these institutions included victims of repeated conflicts between neighboring Greek city States and those expelled by rival States. Later, asylum was associated with the Latin word '*sanctuarium*' meaning sacred or consecrated place.⁹⁴⁹ It was sacrilege to remove or injure people who had sought refuge in temples. Wiesel too could not understand how the word had been transformed so dramatically, noting:

'What has been done to the word refuge? In the beginning the word sounded beautiful. A refuge meant 'home'. It welcomed you, protected you, gave you warmth and hospitality. Then we added one single phoneme, one letter, e, and the positive term refuge became refugee, connoting something negative.'⁹⁵⁰

Despite their resilience, effort and strength of purpose, many refugees do not escape the Gap, even in the Nordics where norms of social democracy and universalism are firmly rooted. It would be naïve to assume that labelling and the negative transformation of the word 'refugee' has not taken its toll on refugees. The Gap comes with many economic miseries, and refugees themselves cannot do much to escape the situation when stereotypes and other negative,

⁹⁴⁷ Ibid.

⁹⁴⁸ P Marfleet, *Refugees in a Global Era* (Palgrave MacMillan 2006) 97.

⁹⁴⁹ Ibid

⁹⁵⁰ E Wiesel, 'The Refugee' in G MacEoin (ed.), *Sanctuary* (Harper and Row, New York 1985) 10 in Emanuel Marx, 'The Social World of Refugees: A Conceptual Framework' (1990) 3 (3) *Journal of Refugee Studies* 189.

powerful labels have been created against them. When a refugee is not selected for a job on the grounds that he or she may be a ‘fortune-hunter’, and the main motive is to take away jobs, or welfare/social benefits which his or her forebears did not contribute to, this can be a stereotype too. However, to understand the *concept* as well as the *content* of stereotype, can be hard work.⁹⁵¹

Refugees thus suffer disadvantages in the form of the Gap because their motives for seeking international protection become blurred. Refugees are pushed out of their countries of origin by discernible forces (the ‘push’ factors), war and violence being the most frequent. However, the ‘standardised image’ the Nordic countries’ labour market might have is that of ‘pull factors’, with destitute victims of wars and or poverty looking for assistance for as long as it takes, and not seeking paid work. But human rights demand the observance of the principle of equality, whereby everyone is treated with equal respect and concern. As postulated by Aristotle, like cases should be treated alike; different cases should be treated differently.⁹⁵² Rewards ought to follow merit. Individual merit, not stereotypical assumptions assigned to everyone as a member of a group, should be the benchmark if respect for the principle of equality is to be observed. To Rawls, the means to earn a living so as to avoid inequality in wealth ‘should come from jobs that are open to anyone on the basis of merit.’⁹⁵³ Employers, both public and private, decide who to employ. They are also some of the most informed members of their respective societies.

However, private employers’ main concerns are the profitability of their firms, meeting the demands of shareholders, and fighting off competitors for market dominance, rather than the moral demands of societies. Public employees also work within fixed budgets; they too may wish to protect nationals from outsiders (refugees, for instance) whose employment would substitute that of nationals, a situation not liked by unionized labour. Both public and private employers can also fall prey to stereotypical behaviour as they may doubt refugees’ abilities to work or solve complex issues.

⁹⁵¹ M Pickering, *Stereotyping: The Politics of Repression* (Palgrave 2001) 8.

⁹⁵² E Ellis and P Watson, *EU Anti-Discrimination Law* (2nd edn OUP 2014) 5.

⁹⁵³ F Dionigi and J Kleidosty, *A Macat Analysis of John Rawl’s a Theory of Justice* (Macat International 2017) 12.

4.7 Proof of discrimination

In Denmark, it is the respondent who is tasked with providing evidence in cases where the person suffers detriment due to direct or indirect discrimination.⁹⁵⁴ The Danish Board of Equal Treatment can assess evidence and offer compensation if a detriment has been suffered. In Finland, the burden of proof is set out in section 28 of the Anti-Discrimination Act (1325/2014). A claimant of discrimination or victimization must present, in the court or other authority, to recount the facts on which the claim is based. Norway, on the other hand, approaches proof of discrimination from the assumption that discrimination has occurred if there are sufficient grounds to believe it.⁹⁵⁵ Again, the burden of proof lies with the respondent to substantially prove that discrimination did not in fact occur.⁹⁵⁶ Sweden too places the burden of proof on the respondent. If a claimant can demonstrate ‘circumstances that give reason to presume that he or she has been discriminated against or subjected to reprisals’, it is for the respondent to convincingly demonstrate that ‘discrimination or reprisals have not occurred’.⁹⁵⁷

Much as the law is clear on the burden of proof, its effective application may depend on many factors. Several questions may be asked and many tests can be carried out before any allegation of discrimination is taken seriously: for example, whether the claimant has suffered an adverse treatment; and whether the detriment is causally linked to prohibited conduct against a protected characteristic. The ‘but for’ and ‘on the ground of’ or ‘because of’ tests must also to be carried out. It should also be noted that causation can differ from objective justification, a strong defense in direct discrimination cases.

4.7.1 Statistical evidence

Indirect discrimination is complex and evidence may sometimes lie in statistical data which can show how many people are affected. Analysis of the data can identify persistent disparity over a period of time between the comparators. Additionally, national courts have discretion to assess whether such statistics are significant, ie whether they include enough

⁹⁵⁴ Consolidation Act Number 1349 s7a.

⁹⁵⁵ The Ethnicity Anti-Discrimination Act Number 60 (21 June 2013 entered into force 1 January 2014) s24a.

⁹⁵⁶ s24b, *ibid*

⁹⁵⁷ The Discrimination Act (2008:567) s3.

individuals; whether they are merely incidental (fortuitous); and whether such an occurrence is not merely ephemeral.⁹⁵⁸ In Norway, for instance, evidence based on statistics can be used in courts even though there are no specific provisions to follow, in cases where it is of ‘practical necessity’ to provide it.⁹⁵⁹ In Danish civil courts, statistical evidence may be a practical necessity to establish indirect discrimination.⁹⁶⁰ In Sweden, statistical evidence may be a necessity, but it is the individual circumstances that determine whether such evidence is necessary. Statistical evidence has been used in sex discrimination, especially in cases related to equal pay and employment.⁹⁶¹ In the Finnish courts too, statistical evidence has been deemed admissible in establishing indirect discrimination. Statistical evidence is often cited in the *ratio decidendi*.⁹⁶²

On the issue of significance of statistics, in *The Board of Equal Treatment’s Secretariat for A and B v. The Agency for Modernisation*,⁹⁶³ the court rejected a case where plaintiffs A (58 years old) and B (55 years old) were dismissed without compensation. The assessment was whether there were factual circumstances based on statistical information on the age of the dismissed employees that gave grounds to presume the presence of age discrimination. When statistical information is reliable and sufficiently significant, the court reasoned, it could give rise to an assumption of discrimination. In this case, however, the age distribution of the rest of the staff and that of the claimants could not create an assumption of discrimination because, although A and B had been dismissed, they were not the eldest staff members. Consequently, A and B lost their claim for compensation due to dismissal based on age discrimination. In another case, a company made 63 of its 149-strong workforce redundant. However, one third of the workers made redundant were over 55 years old. The Board of Equal Treatment used that statistic to establish evidence of indirect discrimination that had targeted older employees and said that it was up to the employer, in addition, to prove that decision-making based on the grounds of age had not occurred.⁹⁶⁴

⁹⁵⁸ E Ellis and P Watson, *EU Anti-Discrimination Law* (2nd edn OUP 2014) 155.

⁹⁵⁹ LE McClimans, *Country Report-Non-discrimination-Norway-2015*, 42.

⁹⁶⁰ P Justesen, *Country Report-Non-Discrimination-Denmark-2016*, 42.

⁹⁶¹ P Norberg, *Country Report-Non-Discrimination-Sweden-2016*, 40.

⁹⁶² R Hiltunen, *Country Report-Non-Discrimination-Finland-2016*, 35.

⁹⁶³ Case Number 28/2015 (Supreme Court of Denmark) 12 December 2015.

⁹⁶⁴ Decision Number 102/2014 (Board of Equal Treatment) 7 May 2014).

On a rather different note, much as statistical evidence may be necessary to establish indirect discrimination, its importance should not be over-emphasised. In the Nordics, there are few cases that require statistical evidence. It should also be noted that its applicability is more relevant in situations regarding unfair dismissal because of, say, age and equal pay cases between men and women of comparable situations. However, without statistical evidence, it can be difficult to quantify the full extent and effects of the Gap. Over a long period, studies have documented unprecedented long-term unemployment among refugees. Using data from 2011, Statistics Sweden revealed that about 43 per cent of foreign-born persons aged 20-64 were not in gainful employment.⁹⁶⁵ The situation for foreign-born women was slightly worse than that of Swedish-born women in a comparable period of five years. Foreign-born persons from Africa and Asia had the weakest position in the labour market, the report concluded.

The newspaper, *Nettavisen*, reported that six out of 10 immigrants from Africa were not in active labour, even though participation in gainful employment is the most important goal of integration, and where income from work and participation in Norwegian society can increase fluency in the Norwegian language, and is a factor necessary for the children of immigrants to succeed.⁹⁶⁶ On average, the newspaper continued, only 40.7 per cent of Africans worked, they were always at the bottom of the statistics, and the tendency was constant whether the Norwegian economy was booming or was in recession. Even after a continuous stay of 10 years, only about 50 per cent worked, half of whom worked less than one hour a week. This situation has persisted over time and across successive governments of different types.⁹⁶⁷ It was concluded that Norwegian working life has enormous problem to integrate many immigrant groups, especially those from Africa.

In the fourth quarter of 2016, Statistics Norway reported an increment of 1.5 per cent in the number of Africans in active employment but still the overall number of employed Africans

⁹⁶⁵ Statistiska Centralbyrån, *Integration – en beskrivning av läget i Sverige: (Integration Rapport 6, 2013)*. See summary in English, 127 – 36. Note that refugees are foreign-born < www.scb.se/Statistik/_Publikationer/LE0105_2013A01_BR_BE57BR1301.pdf > accessed 17 Oct 2017.

⁹⁶⁶ Gunnar Stavrum, 'Seks av ti innvandrere fra Afrika er ikke i arbeid', *Nettavisen* (Six out of Ten Immigrants from Africa are not in Employment) < www.nettavisen.no/mener/seks-av-ti-innvandrere-fra-afrika-er-ikke-i-arbeid/3423232662.html > accessed 27 Oct 2016. Note that most immigrants from Africa living in Norway have refugee background.

⁹⁶⁷ Ibid.

was the lowest-employed among all groups at 42.3 per cent.⁹⁶⁸ In other words, only four out of ten immigrants from Africa were in gainful employment.⁹⁶⁹ Compared with immigrants from Asia, the percentage was 52.⁹⁷⁰ The percentage for the majority population, aged 25-54 years, was 83 per cent.⁹⁷¹

Although there are no statistics from Denmark and Finland, there is no reason to believe that refugees there are in better positions in terms of employment, and in any case the two countries resettle fewer refugees than Norway and Sweden. All in all, such statistics can be vital in analyzing the degree and extent of the Gap and how it affects particular groups. The causes and solutions directed to mitigate the Gap can be hard to extra from such statistics. However, when statistics is not disaggregated, it can be difficult to use as evidence in courts and tribunals or before ombudsmen.

Causation too is hard to prove. Again, attributing specific blame to any one employer on the basis of overall figures is impractical and can even be legally absurd. Based on general human rights principles and States' obligations to protect and fulfil them, such statistics can be useful. For example, because of international criticisms due to lack of disaggregated data on living conditions of different protected groups and lack of disaggregated data according to different discrimination grounds, etc., the government of Sweden commissioned a preliminary study to produce quality data concerning the two areas.⁹⁷² In Finland, there was concern about the absence of disaggregated statistical data on the extent of poverty in the State party's report, particularly among refugees; and when this combined with lack of clearly adopted poverty line,

⁹⁶⁸ Statistisk Sentralbyrå, 'Sysselsatte (15-74 år) etter Innvandringsbakgrunn og Landbakgrunn. 4. Kvartal' (Employed (15-74 years old) according to Immigration Reason and Country Background, 4th Quarter) < www.ssb.no/302125/sysselsatte-15-74-ar-etter-innvandringsbakgrunn-og-landbakgrunn.4.kvartal > accessed 17 August 2017.

⁹⁶⁹ 'Seks av ti innvandrere jobber', NTB (30 March 2017) (Six out of ten immigrants work) < <http://forskning.no/innvandring-arbeid-samfunnsokonomi/2017/03/seks-av-ti-innvandrere-jobber> >

⁹⁷⁰ Ibid.

⁹⁷¹ Ibid.

⁹⁷² The full report is available in Swedish, Yamam Al-Zubaidi, 'Statistikens roll i arbetet mot diskriminering – en fråga om strategi och trovärdighet' (The role of statistics in fighting discrimination – the need for strategies and credibility) (Diskriminerings Ombudsmannen – DO, Swedish Equality Ombudsman) < www.do.se/globalassets/publikationer/rapport-statistikens-roll-arbetet-mot-diskriminering2.pdf > accessed 6 November 2017.

it became difficult for the State party to define the incidence and depth of poverty and to monitor and evaluate progress in alleviating poverty.⁹⁷³

4.8 Conclusion

This chapter has analyzed the concept of discrimination as one of the factors that contributes to the Gap, an analysis which is significant in crafting remedies. The starting point of the analysis was to borrow from other disciplines like sociology, economics, policy analysis, etc., and contextualize them according to international human rights standards, refugees and the Nordics. A wide variety of sources including newspaper articles, OECD reports from the Organization for Economic Co-operation and Development, research journals, Statistics Sweden and Statistics Norway (the official gatherer of statistics in the concerned countries), etc., have confirmed that discrimination against refugees in many areas, including the labour market, does exist. Certain groups of refugees, even if they obtain Nordic education and working experience, still continue to exhibit low rates of labour market participation. The causes are many but discrimination due to ethnicity (nationality, race), religion or belief, and age, could be contributory factors. Discrimination is compounded by stereotypes about refugees. Refugees can be associated with many negative qualities. Stereotypes produce powerful conventional labels that are very difficult to overcome. Under such beliefs, for example, no employer will hire potential ‘terrorists’, ‘naturally aggressive and unreliable’ men, ‘economic immigrants escaping poverty’ in place of nationals who are assumed to be very ‘productive’, ‘reliable’, etc.

Refugees also lack contact through other societal networks such as religion, because the majority are not Lutheran Christians. Furthermore, because refugees increase the heterogeneity of the Nordic society, they can be a target for discrimination because not all people welcome immigrants. However, whether discrimination is interpersonal, societal or statistical, it results in a detriment, suffering and the Gap. Refugees suffer from, *inter alia*, low economic resources (material poverty), and their quality of life (health) declines very quickly. Refugees may avoid companies known to discriminate (deterred discrimination), they may isolate themselves from other members of society (social exclusion), stop looking for work, and permanently depend on

⁹⁷³ CESCR, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant* (Concluding Observations of the Committee on Economic, Social and Cultural Rights, Finland, 16 January 2008 E/C.12/FIN/CO/5) para 17.

welfare benefits which further raises nationals' anxieties towards them. Further integration may be retarded. When persistent discrimination occurs, the principles of substantive equality, whether distributive or corrective, are also strained.

The international human rights system, regional legal systems and the Nordics themselves have created conventions, directives, charters and many domestic anti-discrimination laws and courts (ombudsmen) to rectify the maladjusted systems by combating all forms of unjustified discrimination. The United Nations Charter, the Universal Declaration of Human Rights, the Refugee Convention, ICERD, ICESCR, some General Comments, etc., all contain provisions on discrimination, and suggest ways of how to combat it legally.

The ICERD defined discrimination and the definition has been adopted by several countries, although the texts slightly differ. The European Union adopted the European Convention on Human Rights, the Revised European Social Charter and other directives aimed at fighting discrimination and promoting equality and equal treatment, *inter alia*. The directives were fully transposed into the Nordic domestic legal system, with the exception of Denmark which is yet to recognize the Council of Europe's Collective Complaint Procedure. The Nordics have developed their own anti-discrimination laws and courts (ombudsmen) to adjudicate claims of discrimination. However, even though there are many laws against discrimination, and courts where claims of discrimination can be lodged, linking discrimination law back to the Gap comes with enormous challenges.

Discrimination poses conceptual as well as definitional problems. Discrimination is a legal concept engulfed in complicated legal terminologies. For example, grounds or protected characteristics, direct/indirect discrimination, harassment and victimization, etc., are terms that carry specific meanings. Other terms, especially those used in indirect discrimination, can perplex people without a legal background, including refugees. The main grounds on which refugees are protected are religion, ethnicity (race) and age. Again, defining what religion and belief are, or how such protected grounds can be linked to the Gap, is not straightforward. Knowing how and when refugees are discriminated against because of their ethnicity, religion, age, etc., can be challenging because candidates may be rejected for many reasons. Whether job-recruiters too are aware of what discrimination is, it is difficult to ascertain. In most incidents, incriminating evidence is hard to come by in cases where discrimination has occurred. Reversing

the burden of proof can relieve the already burdened claimants, but they are still expected to have substantive evidence which has causal linkages.

Under direct discrimination, a claim can be lodged using other grounds like ethnic origin ('race', nationality, skin colour, and other biomarkers); religion (belief), language, etc. As persons with one or several protected characteristics, refugees may be directly discriminated against through avoidance and rejection during recruitment. Tasking employers to prove that they do not discriminate against refugees is not easy because several candidates may be as qualified or experienced as refugees. Indirect discrimination, on the other hand, is hard to detect as it operates in disguise and can, on many occasions, be justified, for example, under the premise of genuine occupational requirements.

The international human rights regime recognizes the destruction that discrimination can wreak on individuals and societies at large. It has formulated the definition of discrimination, and complex legal reasoning accompanied by guidelines, but the concept remains elusive and slippery, sometimes left to the intuition of judges. Whether it is civil (codified) law jurisprudence practiced in the European Union, referral to case law is still a common feature in the courts and tribunals and even in the Nordics' unique 'ombudsmen'. Still, cases must meet the admissible criteria, and hearings must take place. Each Nordic State administers anti-discrimination laws and measures differently. The Danish and Swedish ombudsmen can award compensation once a claim of discrimination has been confirmed. In Norway, the Equality and Anti-Discrimination Ombud and Equality and Anti-Discrimination Tribunal (the Appeals Court) cannot enforce active equality efforts nor offer economic and non-economic loss, but they can give advice to parties who feel discriminated. They can also give out their expert opinion on cases of discrimination. The tribunal can administer coercive fines but the provision of guidance to victims of discrimination is its main purpose.

Apart from discrimination that occurs before recruitment, refugees are more prone to dismissal because as outsourced, temporary or part-time employees with on-call and zero-hours contracts, they are rarely protected by law. Their rejection during recruitment is the ultimate quandary. Anti-discrimination laws are more effective in protecting persons with contracts: employees with an indefinite contract cannot be unfairly dismissed without invoking the law. Equal pay between men and women for equal work of equal value, for instance, and conditions at work places, etc., can more easily be adjudicated than for example, claims for failure to be

called for a job interview, or failure to pass the interview. If anti-discrimination laws are to effectively protect refugees, the world may need a new convention and a corresponding committee that will give refugees ‘protected characteristics’ and monitor their progress. The principle of ‘reasonable accommodation’, where ‘necessary and appropriate modifications and adjustments not imposing a disproportionate or undue burden, where needed in a particular case’, can be employed to ensure refugees have ‘an equal basis with others’ in accessing the labour market so that they realize their ‘human rights and fundamental freedoms’.⁹⁷⁴ Companies can get tax relief for each refugee employed, to be followed by substantial government contracts. Associating with refugees should be promoted and not associated with loss of sales and hence lower profits. In the worst-case scenario, failure to employ a single refugee should result in a company being blacklisted and its products and services internationally boycotted. The next chapter will expand these points by crafting of effective remedies. Remedies may include structural interdicts like reparations and declaration of relief.

⁹⁷⁴ CPRD art 2.

Chapter 5. Remedies for the Gap

5.1 Introduction

Although the origin of the Refugee Gap (the Gap) is complex and multi-faceted, its persistence and effects are not contestable. In Norway, for example, the employment rates of certain groups of people with refugee backgrounds in the last quarter of 2015 was as low as 40.7 per cent.⁹⁷⁵ Interpreted differently, about 59 per cent of that group were not in gainful employment. Although the rate of employment can rise to 50 per cent after 10 years, this was still categorized as low.⁹⁷⁶ Furthermore, half of these employed refugees were working only one hour a week.⁹⁷⁷ In Sweden, the situation was no better.⁹⁷⁸ Statistics confirmed that the Gap existed at substantial levels.

This reality raises a few questions: why are a few groups of immigrants, especially those with a refugee background, more adversely affected than others? Does such numerical information (statistics) carry any message to the policy-makers and policy-implementers, as General Comment Number 3 of the Committee on Economic, Social and Cultural Rights stipulates?⁹⁷⁹ How can such a situation of minimal employment opportunities be interpreted in the light of international human rights law's triad of obligations to protect, respect, and fulfil?⁹⁸⁰ How effectively do the primary duty-bearers (the States) observe the principle of equality and non-discrimination in refugees' access to employment as recommended by Committee on

⁹⁷⁵ B Olsen and Ekeland, 'Sysselsetting blant innvandrere, registerbasert, 2015, 4. kvartal', SSB (Registered-Based Employment among Immigrants, 4th Quarter 2015, Statistics Norway, 8 June 2016) < www.ssb.no/arbeid-og-lonn/statistikker/innvregsys/aar/2016-06-08 > Accessed 29 November 2017.

⁹⁷⁶ G Stavrum 'Seks av Ti Innvandrere fra Afrika er ikke i arbeid' (Nettavisen) < www.nettavisen.no/mener/seks-av-ti-innvandrere-fra-afrika-er-ikke-i-arbeid/3423232662.html > accessed 26 January 2017.

⁹⁷⁷ Ibid.

⁹⁷⁸ Statistiska Centralbyrå, 'Integration: en beskrivning av läget i Sverige , Rapport 6' (Statistics Sweden, Integration: Report 6, a Description of the Situation in Sweden, Report 6, 2013) < www.scb.se/Statistik/_Publikationer/LE0105_2013A01_BR_BE57BR1301.pdf > accessed 29 November 2017.

⁹⁷⁹ CESCR, *General Comment No. 3: The Nature of States Parties' Obligations* (Art. 2, para. 1, of the Covenant)', UN Doc E/1991/23, adopted 14 December 1991.

⁹⁸⁰ UN CESCR, *General Comment Number 3* (The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant) document E/1991/23) para 10; Shelton and Gould, 'Positive and Negative Obligations' in D Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 562, 567.

Economic, Social and Cultural Right's General Comment Number 20?⁹⁸¹ Are there acts of *omission* and *commission* in national policies that contribute to the Gap?⁹⁸² How can the Gap be mitigated? This chapter analyses whether the Gap is a human rights violation. It also discusses the various paths the Nordics can follow to minimize the metaphorical snowball effect.

5.2 The Gap is partly a consequence of non-observance of human rights

For quite some time, the Nordics' exceptional approach to the norms of 'solidarity, equality and (social) democracy' qualified them to be externally referred to as 'moral superpowers'.⁹⁸³ By the internalization of human rights norms, Scandinavians came to be regarded as 'global Good Samaritans'.⁹⁸⁴ However, in the face of the Gap, such reverence can be misplaced unless reinvigorated by policy-makers. Refugees are undeniably protected at the minimum threshold, just like any other citizen who qualifies for such protection.⁹⁸⁵ However, the long-term unemployment that affects over 50 per cent of refugees mars and potentially ruins this record and image of benevolence. When the Gap persists and persists, refugees' physical and psychological mental abilities quickly deteriorate.

Practices that objectively but unjustifiably discriminate against refugees may partially explain why the situation is perpetual even when various approaches to combat it are in place. It

⁹⁸¹ UN CESCR, *General Comment Number 20: Non-discrimination in Economic, Social and Cultural Rights* (art 2, para 2, of the International Covenant on Economic, Social and Cultural Rights).

⁹⁸² On Actions and Omissions that tantamount to violation of economic and social rights, see generally, 'The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights', 1998 (20) Human Rights Quarterly, 691–705; The Limburg Principles on the Implementation of the Covenant on Economic, Social and Cultural Rights (1987) 9 Human Rights Quarterly 124. Although it was a declaration by academicians, it nonetheless remains an important human rights document.

⁹⁸³ M Langford and JK Schaffer, 'The Nordic Human Rights Paradox: Moving Beyond Exceptionalism' (PhD Thesis, Norwegian Centre for Human Rights, University of Oslo 2014); JC Ersen and MR Madsen, 'The End of Virtue? Denmark and the Internationalisation of Human Rights' (2011) 80 (3) Nordic Journal of International Law 257–277.

⁹⁸⁴ JC Ersen and MR Madsen *ibid.* For extra flattering epithets of Scandinavian human rights, see M Langford and JK Schaffer *ibid.*

⁹⁸⁵ CESCR, General Comment Number 3 elaborates what minimum core obligation could entail. The Nordics, through Universalism, have gone beyond the minimum threshold.

should be noted that differentiating between or treating persons differently can be justified under the guise of ‘genuine and determining occupational requirements’.⁹⁸⁶

International human rights, however, abhors discrimination⁹⁸⁷ on any grounds if respect for dignity,⁹⁸⁸ equality of opportunities and/or outcome;⁹⁸⁹ social justice,⁹⁹⁰ etc., are to be fully realized. The international human rights regime is not built upon whimsical or fragile pillars of belief, conviction or foundation. Nor can human rights be compared to some ephemeral government policies which can be changed according to time and context. Since 1948, for instance, human rights have been called foundational pillars which have stood the test of time as they are universally true. Respecting them would weaken the Gap’s gravity, and offer a potential panacea which is within reach.⁹⁹¹

All people, including refugees, share certain values simply because they are humans. This line of thought does not differ from what Kant referred to as the ‘virtue of humanity’.⁹⁹² In the categorical imperatives, each human being should be treated ‘as an end, never merely as a means’.⁹⁹³ Universal inheritance and inalienability mean that no person can confer those rights on another; and neither can an individual take away such rights from another without violating them. The right to work, for example, is a universal value (right) in itself and is shared by all human beings. Its breach, whether by acts of omission or commission, ought to be politically

⁹⁸⁶ European Union, *Council Directive 2000/78/EC of 27 November 2000 Establishing a general framework for equal treatment in employment and occupation*, OJ L 303, 2 December 2000, preamble para 23 and Article 4.

⁹⁸⁷ CESCR *General Comment Number 20*; Charter of Fundamental Rights of the European Union (OJ C 346/1, 18 December 2000) Article 21; Council of Europe, *Protocol Number 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms* (European Treaty Series Number 177, 4 November 2000) art 1.

⁹⁸⁸ On the complexities of dignity as an international human rights concept, see for example, P Carozza, ‘Human Dignity’ in D Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 346.

⁹⁸⁹ J Clifford, ‘Equality’ in D Shelton (ed) *The Oxford Handbook of International Human Rights Law* (OUP 2013) 420, 428, 429.

⁹⁹⁰ JM Diller, ‘Social Justice, Rights, and Labour’ in D Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 307. For example, prevention of unemployment can be one of the ways of reducing deprivation that leads to general unrest.

⁹⁹¹ The universally agreed upon pillars in the Universal Declaration of Human Rights. For a detailed analysis of the *raison d’être* of the UDHR, see, WA Schabas (ed), *The Universal Declaration of Human Rights: The Travaux Préparatoires* Volumes 1-3 (CUP 2013).

⁹⁹² I Kant, ‘The Metaphysical Elements of Justice: Part 1 of the Metaphysics of Morals’ (1965) 38 in D Moeckli, *Human Rights and Non-Discrimination in the ‘War on Terror’* (Oxford Monographs in International Law, OUP 2008) 60.

⁹⁹³ I Kant, ‘Groundwork of the Metaphysics of Morals’ (CUP 1998) 38 in Moeckli, *Human Rights and Non-Discrimination in the ‘War on Terror’* (Oxford Monographs in International Law, OUP 2008) 60.

sanctioned, for example, through reparation, adopting special measures and others measures of satisfaction through dialogues, respect for and fulfilling refugees' individual rights, etc.

Normatively, all human beings of working age who are able to work, are actively looking for work and are willing to work in the existing conditions even when such work is boring and frustrating, should be assisted by State authorities and private individuals to secure it.⁹⁹⁴ The tentacles of long-term unemployment, which emanate partly from discrimination, stereotyping and disrespect for the principles of substantive equality, violates the right to work. In such a situation, States Parties have an obligation to intervene through, for example, awarding damages as a way of 'buying off' the violation.⁹⁹⁵

Currently, refugees under the Gap have very limited remedies, if any. Even in periods of economic boom, when most nationals and immigrants ie groups without refugee background, are in employment, most refugees do not find work even when they are willing and are able to work. Jobs remain elusive. This can be symptomatic of the intricacies and complexities within the labour market which the refugees cannot themselves defeat. In this context it is important to note what General Comment Number 20⁹⁹⁶ elaborated: that the removal of formal discrimination from a constitution, laws and policies cannot of itself lead to the substantive equality envisaged in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights. Attention should be paid to 'groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations...'⁹⁹⁷ The conditions and attitudes that cause and perpetuate substantive or *de facto* discrimination must be prevented, diminished and eliminated by adopting immediate and necessary measures by States Parties.⁹⁹⁸ If international human rights law is not heeded, the Gap will continue to steadily creep in.

Equality (both of opportunities and of the degree of their availability) is another human rights pillar which makes clear that 'equal in dignity' and 'equal in rights' mean that all people

⁹⁹⁴ See generally the ICESCR; the Finnish, the Norwegian and the Danish Constitutions.

⁹⁹⁵ Jason NE Varuhas, *Damages and Human Rights* (Hart Publishing 2016) 347.

⁹⁹⁶ Para 8(b).

⁹⁹⁷ Ibid.

⁹⁹⁸ Ibid.

‘have essentially the same rights’.⁹⁹⁹ Furthermore, ‘equal in dignity’ and ‘equal in rights’ mean ‘of equal concern’ in issues of public justice.¹⁰⁰⁰ Human dignity is ‘inviolable’ and must therefore be protected and respected, if one follows the European Union Charter of Fundamental Rights.¹⁰⁰¹ According to Albie Sachs:

‘Respect for human dignity is the unifying constitutional principle for a society that is not only particularly diverse, but extremely unequal. This implies that the Bill of Rights exists not simply to ensure that the “haves” can continue to have, but to help create conditions in which the basic dignity of the “have nots” can be secured.’¹⁰⁰²

Although Sachs was referring to the experience of post-apartheid South Africa, his observation directly applies to refugees under the Gap. They are a diversified group coming from far and wide, joining a ‘homogeneous’ group of Europeans/Scandinavians. Nevertheless, the preamble of the consolidated version of the Treaty of the European Union states that ‘...the culture, religion and humanist inheritance of Europe ...’ inspired the development of the ‘universal values of the inviolable and inalienable rights of the human person... equality and the rule of law’.¹⁰⁰³ The preamble continues that the European Union is attached to the principle of ‘respect of human rights and fundamental freedoms’, and also respects ‘fundamental social rights as defined in the European Social Charter’ of 1961.¹⁰⁰⁴

By and large, the Nordics are bound to respect social rights, like the right to work. Social rights (to which the right to work belongs) are fundamental and are established by law or treaty. Because dignity is ‘a foundational value, the intrinsic worth of every person’, its protection is a

⁹⁹⁹ Avishai Margalit, ‘The Decent Society’ (Harvard University Press 1996) 9 in Y Haeck *et al.* (eds), *Human Realisation of Human Rights: When Theory Meets Practice. Studies in Honour of Leo Zwaak*, (Intersentia Publishing Limited 2013) 45; O Schachter, ‘Human Dignity as a Normative Concept’ (1983) 77 (4) *American Journal of International Law* 848, 852 in Y Haeck *et al.* *ibid* 45.

¹⁰⁰⁰ Y Haeck *et al.* *ibid* 47.

¹⁰⁰¹ B Hepple, *Equality: The Legal Framework* (2nd Hart Publishing 2014) 20.

¹⁰⁰² A Sachs, ‘The Strange Alchemy of Life and Law’ (OUP, 2009) 213 in K Monaghan QC, *Equality and Non-Discrimination* (Annual Conference, Bar European Group and Administrative Law Bar Association, Athens 2011).

¹⁰⁰³ European Union, *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union* (2012/C 326/1) OJ C 326/1, 26 October 2012) para 3.

¹⁰⁰⁴ *Ibid* para 6.

sine qua non if any iota of equality and non-discrimination is to be realised.¹⁰⁰⁵ Every person's dignity matters, irrespective of whether the concerned person can take his or her decisions on his or her own life.¹⁰⁰⁶ Equal access to employment opportunities that partly redistribute society's resources can be a venue for achieving 'equality of outcome'.¹⁰⁰⁷ This is what 'justice and fairness' is basically inclined to.¹⁰⁰⁸ Under the Gap, values like dignity, substantive equality, *etc.*, vanish into a puff of smoke, even though States are under obligation to respect all human rights. This chapter therefore discusses the strategies that may be useful in this quest. But before going further, it is necessary to briefly show how and why the Gap exists and then assess the acts of omission or commission of States, which they seem to not appreciably recognise.

5.3 The Nordics' human rights obligations

In the Nordics, international human rights are not only respected as sources of national laws but they are also constitutional rights as well. The constitution of Norway states: 'It is incumbent upon Statutory Authorities to respect and protect human rights'.¹⁰⁰⁹ Likewise, the Finnish constitution clearly states that: 'The public authorities shall guarantee the observance of basic rights and liberties and human rights.'¹⁰¹⁰ In Sweden, too, there is an observation: 'The idea that humanity has certain natural fundamental rights and freedoms, which people in positions of power should not abuse, has been kept alive ever since antiquity'.¹⁰¹¹ The incorporation of the European Convention on Fundamental Rights into Swedish laws means that human rights, indivisible as they are, are constitutional rights too. Finally, in Denmark, although the phrase 'human rights' is not used, social rights such as the right to work, social security, education, *etc.*,

¹⁰⁰⁵ Y Haeck et al. (eds), *Human Realisation of Human Rights: When Theory Meets Practice. Studies in Honour of Leo Zwaak* (Intersentia Publishing Limited 2013) 44; B Hepple, *Equality: The Legal Framework* (2nd edn Hart Publishing 2014) 20.

¹⁰⁰⁶ J Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press 1989) 17, 24; Preamble to the Universal Declaration of Human Rights in Y Haeck et al (2013).

¹⁰⁰⁷ See section 3.2.3 on the subject.

¹⁰⁰⁸ A Clapham, *Human Rights: A Very Short Introduction* (OUP 2007) 143.

¹⁰⁰⁹ Section 110 C

¹⁰¹⁰ The Constitution of Finland 11 June 1999 (731/1999) s22 < www.scandinavianlaw.se/pdf/52-23.pdf > accessed 27 October 2017.

¹⁰¹¹ The Constitution of Sweden: The Fundamental Laws and the Riksdag Act, s10.

are constitutionally guaranteed.¹⁰¹² Much as human rights are constitutionally protected, the level of commitment to their realization, especially those connected to accessing employment by refugees, remains an area for debate.

The Nordics signed and ratified many international human rights instruments which can be compared to the ‘Bill of Rights’ Albie Sachs referred to.¹⁰¹³ These include, among others, the International Covenant on Economic, Social and Cultural Rights and the international Covenant on Civil and Political Rights; the European Convention on Human Rights (where everyone’s rights and freedoms defined in the Convention shall be safely secured, without any distinction whatsoever);¹⁰¹⁴ and the 1961 European Social Charter and its revised version of 1996.¹⁰¹⁵ Article 2(1) of the International Covenant on Economic, Social and Cultural Rights is the lynchpin for the respect of economic and social rights. It sets out the obligations of States Parties, namely to respect, protect and fulfil. States Parties have obligations to, for example, take steps, cooperate internationally, work individually, etc., to ensure that rights within the Covenant are fully realized. The available resources are expected to be used maximally, all appropriate means like legislative measures, etc., are recommended so that rights in the Covenant are realized, particularly in countries like the Nordics that ratified the International Covenant on Economic, Social and Cultural Rights with no reservation or derogation of Article 2(1). States Parties are expected to keep agreements. There is a mutual relationship between ratification of, say, conventions and treaties, etc. and the obligation to respect or observe the concerned convention, treaty, etc.: the ‘*pacta sunt servanda*’ principle.¹⁰¹⁶ Fulfilling an agreement is one of the overarching reasons why agreements in general, exist.

As full and mature democracies, the Nordics ought to be fully observing the rule of law. This requires, *inter alia*, that constitutionally guaranteed rights are respected. It means, in addition, that internationally agreed human rights values and norms (such as dignity and the right

¹⁰¹² The Danish Constitution of 1953 s7576.

¹⁰¹³ Ibid (n 1002)

¹⁰¹⁴ ECHR art 1.

¹⁰¹⁵ Among the Nordics, it is only Denmark that has neither signed nor ratified the 1996 Revised European Social Charter.

¹⁰¹⁶ Vienna Convention on the Law of Treaties (adopted 23 May 1969, United Nations Treaty Series Volume 1155) (VCLT) art 26.

to not suffer from discrimination which is not objectively justified), are respected and guarded by, for example, legislative measures. Respect for human rights, especially by those with authority, is very important because, even in specific circumstances that may require a human right to be taken away or restricted, the rule of law must be strictly interpreted.¹⁰¹⁷ Even under emergency conditions when authorities can derogate¹⁰¹⁸ from international human rights law obligations under the principle of ‘margin of appreciation’, proportionality is a prerequisite. This means that the means/measures employed must not only be contextual and suitable for achieving the pursued aim, but they must also be necessary and not disproportionate.¹⁰¹⁹ The requirement for balance encompasses the presence of an appropriate ‘fit’ between the means and the ends if a measure is not to result in differential treatment.¹⁰²⁰

As a normative expectation of the rule of law, courts must be independent and impartial. Rules and regulations must be applied consistently and with all due diligence if miscarriages of justice are to be avoided. The Nordics, on the other hand, are not oligarchies where ‘the elite tends to receive the benefits of society’s production leaving others at a disadvantage’, which leads to violation of human rights because it forces ‘the disadvantaged to a degrading position’.¹⁰²¹ The experience of the Gap can make refugees wonder why it is they who suffer disproportionately, whether in hard times of recession (economic downturn) or when the economy is booming. For example, one study noted that: ‘Except for Western Europeans, immigrant employment rates are far more sensitive to labor market conditions. The employment rate of male refugees falls by more than five percentage points when the overall local

¹⁰¹⁷ C Tomuschat, *Human Rights: Between Idealism and Realism* Vol. XIII/1 (Academy of European Law, European University Institute, New York 2003).

¹⁰¹⁸ European Convention on Human Rights (ECHR) art 15.

¹⁰¹⁹ *National Union of Belgium Police v Belgium* Application Number 4464/70 (ECtHR 27 October 1975) para 49. See also K Möller, ‘Constructing the Proportionality Test: An Emerging Global Conversation’ in L Liora, C McCrudden and N Bowles, *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014) 31-40, 33.

¹⁰²⁰ D Moeckli, *Human Rights and Non-Discrimination in the ‘War on Terror’* (Oxford Monographs in International Law OUP 2008)

¹⁰²¹ M Mikkola, *Social Human Rights of Europe* (Karelactio 2010) 4.

unemployment rate increases by one per cent.’¹⁰²² The pattern was similar to women.¹⁰²³ Compared with male natives, a one percentage increase of unemployment rate resulted in 1.16 percentage points.¹⁰²⁴ The drop was almost similar in magnitude.

Long-term unemployment creates the effect of ‘indefinite holidays’ even though the refugees are too poor to afford them. Again, this raises questions of whether they are living in democratic societies where economic and social rights are fully respected, or in oligarchies.

The experience of the Gap has led refugees to cast doubt on the Nordics’ observance of and commitment to the International Covenant on Economic, Social and Cultural Rights and the European Social Charter, among other internationally agreed treaties, conventions and agreements. Confronted with such a situation, any legitimate government ‘must respect fully the liberty and the right of each person to decide for himself how to make something valuable of his life’.¹⁰²⁵ It is right and appropriate to resuscitate refugees’ individual liberties and choices, which are otherwise thoroughly dwarfed by the Gap. Full participation in the labour market is a human rights normative expectation. It is rather ‘abnormal’ for any human being not to work, especially when that person is able and is willing to work. Any government is obliged to show ‘equal concern’ for the fate of every person over whom it claims domain, where ‘resource equality’ is equal to ‘equality of opportunities’.¹⁰²⁶ Following that reasoning, governments have a duty to control and attenuate the effects of the Gap.¹⁰²⁷

5.3.1 General duties and obligations of States under human rights

States, including the Nordic countries, have both obligations of conduct and obligations of results.¹⁰²⁸ The trichotomous obligations are the duties to: respect (no interference by States

¹⁰²² B Bratsberg, O Raaum and K Røed, ‘Immigrant Labor Market Integration across Admission Classes’ in B Bratsberg et al., *Nordic Economic Policy Review: Labor Market Integration in the Nordic Countries* (TemaNord 2017:520, Nordic Council of Ministers 2017) 38.

¹⁰²³ Ibid.

¹⁰²⁴ B Bratsberg, O Raaum and K Røed, *ibid.*

¹⁰²⁵ Dworkin (2011) 2 in Y Haeck et al. (eds), *Human Realisation of Human Rights: When Theory Meets Practice. Studies in Honour of Leo Zwaak*, (Intersentia Publishing Ltd 2013) 2.

¹⁰²⁶ Dworkin (2011) *ibid.* 3.

¹⁰²⁷ CESCR *General Comment Number 20* para 9.

¹⁰²⁸ CESCR, *General Comment Number 3*; The Maastricht Guidelines.

in the enjoyment of a right or rights); protect (prevent a party or third parties from violating human rights); and fulfil human rights, by taking all measures possible.¹⁰²⁹ In *FEANTSA v. France*¹⁰³⁰ and later in the *International Movement ATD Fourth World v. France*,¹⁰³¹ for instance, it was noted that the Charter [EHCR] had to take ‘practical and effective form, rather than purely theoretical form’.¹⁰³²

If it is not to be interpreted as a diversion from the Charter, States Parties are obliged to, *inter alia*,

‘...adopt the necessary legal, financial and operational means of ensuring steady progress towards achieving the goals set out in the Charter; maintain meaningful statistics on needs, resources and results; undertake regular reviews of the impact of the strategies adopted; establish a timetable; and pay close attention to the impact of the policies adopted on each of the categories of persons concerned, particularly the most vulnerable.’¹⁰³³

The Charter can be equated to international human rights instruments that protect, for example, the right to work. In General Comment Number 9 of the Committee on Economic, Social and Cultural Rights, it is emphasized that the rights within the ICESCR can be realized by ‘all appropriate means’, whether legal, administrative or other considerations.¹⁰³⁴ If refugees’ right to work is violated through, for example, discrimination, then national or domestic jurisdiction must step in and provide redress through remedies; and a demand for government accountability can also be lodged through appropriate means.¹⁰³⁵ States are also obliged to use maximum available resources.

¹⁰²⁹ A Eide, ‘Realization of Social and Economic Rights and the Minimum Threshold Approach’ (1989) 10 (2) *Human Rights Law Journal* 33 – 51 in M Mikkola, *Social Human Rights of Europe* (Karela 2010) 24; W Kälin and J Künzli, *The Law of International Human Rights Protection* (OUP 2009); CESCR, *General Comment Number 3: The Nature of States Parties Obligations* (adopted 14 December 1990 UN Doc E/1991/23); Maastricht Guidelines.

¹⁰³⁰ European Committee on Social Rights, *European Federation of National Organisations Working with the Homeless (FEANTSA v. France)*, Complaint Number 39/2006 (European Committee of Social Rights, 5 December 2007).

¹⁰³¹ Complaint Number 33/2006 (European Committee on Social Rights).

¹⁰³² *FEANTSA v. France* para 55.

¹⁰³³ *FEANTSA v. France*, para 56 (a – e).

¹⁰³⁴ CESCR, ‘*General Comment Number 9: The Domestic Application of the Covenant*’ (adopted 3 December 1998 E/C.12/1998/24) para 1.

¹⁰³⁵ *Ibid* para 2.

5.3.2 The concept of maximum available resources

The purpose of the use of the phrase ‘maximum available resources’ is to promote and implement rights (the obligations of means or conduct) recognised in, inter alia, the International Covenant on Economic, Social and Cultural Rights and the European Social Charter. If refugees get unrestricted access to equal opportunities by the use of maximum available resources, then the principle of obligation of means can be fulfilled. Both financial and human resources are required. Providing unlimited amounts of financial resources but having a poorly trained labour force, or a labour force reluctant to make a project succeed, would make no more impact than having no financial resources at all. Such a labour force might be interested only in securing their jobs so as to reap the benefits emanating from employment. Obvious benefits accruing from employment include social status, wages, access to loans which can be used to acquire mortgages (property), pensions, etc. Without access to employment, refugees, like other vulnerable groups in any society, can become ‘end products’ ie refugees themselves create employment opportunities for the rest of the population. It is fair and just in the short-term. In the long-term, however, the aims and purposes of such projects that minimally achieve their objectives may be doubted by refugees under the Gap. Again, living on social benefits for a decade or more, while working tirelessly but unsuccessfully to make oneself attractive to the partially *laissez-faire* labour market, can ultimately lead people to question the effectiveness of the whole system, although the person on welfare benefits, as a general rule, bears most of the burden.

Furthermore, the level of resources a government dedicates to any project, such as training refugees to become attractive to the labour market, is determined by the national budget. A budget reflects the extent of a bundle of resources a State can afford and how those resources are allocated to different competing sectors, including the obligation to fulfil economic and social rights. Fulfilling social and economic rights requires, among other things, that States dedicate enough budgetary resources to protect the fundamental rights of equality and non-discrimination as a means of complying with the fulfilment of obligation of results. So it is necessary to ask whether the Nordic States use the available resources maximally and efficiently so that refugees grappling with the Gap are pulled up from it. How much of the national

budget,¹⁰³⁶ for instance, is specifically dedicated to refugees after they complete the introduction programme? According to Thomas Hammarberg, former Commissioner for Human Rights of the Council of Europe, analysis of the national budget was ‘particularly important’ in the endeavour of protecting economic and social rights, even in periods of crisis.¹⁰³⁷

5.3.3 States’ duty to monitor human rights

The extent to which the Gap is directly attributable to States’ acts of omission or commission is difficult to assert with certainty. However, as noted in General Comment Number 1 of the Committee on Economic, Social and Cultural Rights, each State Party to the International Covenant on Economic, Social and Cultural Rights has a duty to monitor the ‘actual situation with respect to each of the rights on a regular basis’ and the extent to which such a right or rights are ‘being enjoyed by all individuals within its territory or under its jurisdiction’.¹⁰³⁸ It is one of the treaty¹⁰³⁹ obligations for countries ‘to measure and provide reliable data and indicators’ of the progress or regression of realization of human rights.¹⁰⁴⁰ Because ‘human rights indicators are based on international legal standards and linked with a corresponding notion of accountability’,¹⁰⁴¹ monitoring should not mean preparing only ‘aggregate national statistics or estimates’.¹⁰⁴² Paying special attention to, *inter alia*, any ‘specific groups or subgroups’ assessed as being ‘particularly vulnerable or disadvantaged’ is part of the requirement.¹⁰⁴³

¹⁰³⁶ Aoife Nolan ‘Budget Analysis and Economic and Social Rights’ in E Riedel, G Giacca and C Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges*, (Oxford Scholarship Online, May 2014) 369, 370.

¹⁰³⁷ T Hammarberg, ‘State Budgets Reveal Weather Governments are Committed to Human Rights’ in A Nolan *ibid* 370.

¹⁰³⁸ CESCR, *General Comment Number 1: Reporting by States Parties* (adopted 27 July 1981 Doc E/1989/22) para 3.

¹⁰³⁹ ICESCR art 16.

¹⁰⁴⁰ Human Rights Council, *Question of the Realization in all Countries of Economic, Social and Cultural Rights* (27 January 2016 A/HRC/31/31) para 6.

¹⁰⁴¹ *Ibid* para 7.

¹⁰⁴² CESCR, *General Comment Number 1*.

¹⁰⁴³ *Ibid*.

The Gap is closely monitored. For example, Statistics Norway noted that by the end of 2010, about 158,000 people with refugee backgrounds were living in Norway,¹⁰⁴⁴ of whom fewer than 24,000 (about 15 per cent) were resettlement refugees, the subject of this thesis.¹⁰⁴⁵ In the fourth quarter of 2010, about 9,800 of these resettlement refugees (48 per cent) were in gainful employment, which was 2.8 per cent lower than the average for all refugees.¹⁰⁴⁶ For the whole population of Norway, the rate of participation in gainful employment was 69.1 per cent.¹⁰⁴⁷ This rate varied considerably among different groups. Among the four biggest groups of immigrants (refugees inclusive), Iraqis scored the lowest with 34 per cent; followed by Burmese (Myanmar), who are relatively new arrivals with 42 per cent; Iranians on 52 per cent; and Vietnamese (who have lived in Norway for longer) on 63 per cent.¹⁰⁴⁸ Among Eritreans and Somalis, the rate of participation in gainful employment was 27.2 and 25.4 per cent respectively.¹⁰⁴⁹

Almost a quarter (24.8 per cent) of the refugees in employment (both men and women, aged 15-74) were working in health and social services, and 16.7 per cent were in merchandising and motor vehicle repair, while 11.8 per cent were in the retail trade.¹⁰⁵⁰ In finance and insurance services, no refugees were registered as working there.¹⁰⁵¹ This raises a few questions, such as why there were none, or whether the number was too small to be captured by statistics. However, this is not indicated in the report. Lack of education is one possible explanation, although resettlement refugees do study at various universities after completing the language requirements. Some study management that include economics, econometrics, corporate finance, financial accounting, statistics, investment finance, mathematical modelling, etc. It must therefore be considered that there could be unexplained reasons why the situation was like this.

¹⁰⁴⁴ K Henriksen, 'Overføringsflyktninger i Norge, Rapporter 7/2012' (Statistisk sentralbyrå, Oslo–Kongsvinger) ('Resettlement Refugees in Norway, Report 7/12', Statistics Norway, Oslo-Kongsvinger)13 < www.ssb.no/a/publikasjoner/pdf/rapp_201207/rapp_201207.pdf > accessed 23 August 2017.

¹⁰⁴⁵ Ibid 16

¹⁰⁴⁶ Ibid 25

¹⁰⁴⁷ Ibid table 4.1, 13.

¹⁰⁴⁸ K Henriksen, 'Overføringsflyktninger i Norge, Rapporter 7/2012' (Statistisk Sentralbyrå, Oslo–Kongsvinger), Table 4.3.

¹⁰⁴⁹ Ibid.

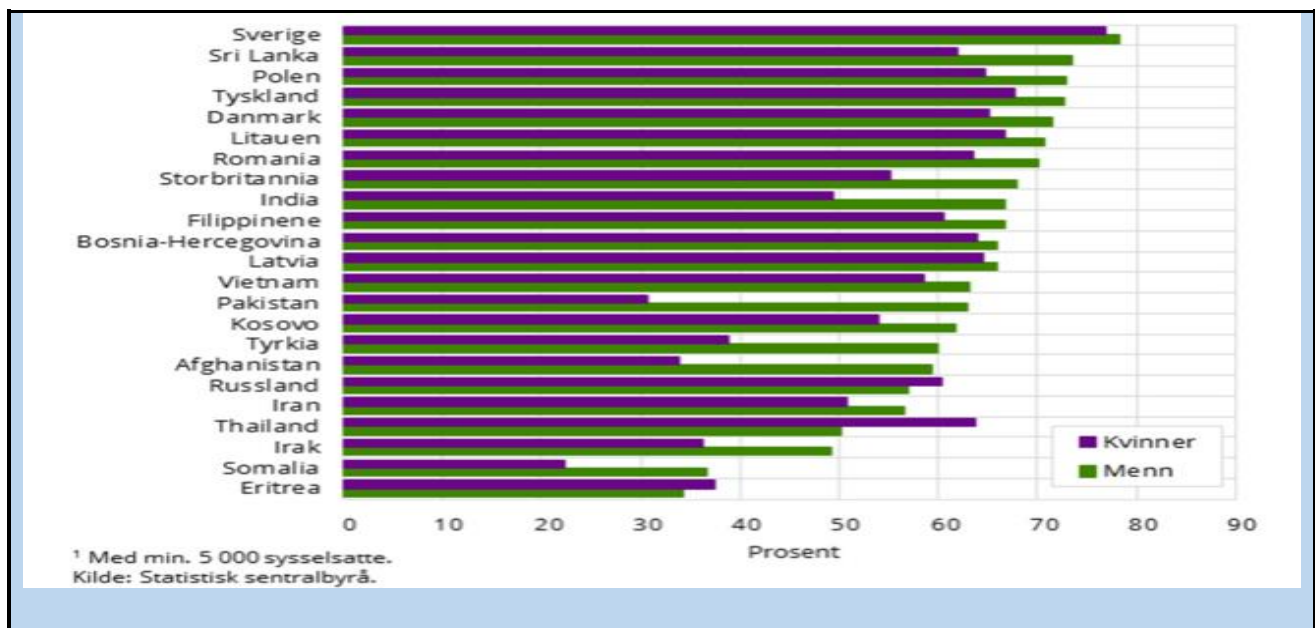
¹⁰⁵⁰ K Henriksen, 'Overføringsflyktninger i Norge, Rapporter 7/2012' (Statistisk sentralbyrå, Oslo–Kongsvinger) ('Resettlement Refugees in Norway, Report 7/12', Statistics Norway, Oslo-Kongsvinger)

¹⁰⁵¹ Ibid table 4.4.

Could there be elements of discrimination or prejudice in recruitment practices? Further questions can be raised as to what State authorities should do when they discover that some sectors have completely locked out certain groups of people from their workforces.

According to figure 5.1 below, over 77 per cent of Swedish ('Sverige') immigrants in Norway (both men and women), were in gainful employment in the fourth quarter of 2016.¹⁰⁵² In the same figure, Eritreans ('Eritrea'), Somalis ('Somalia') and Iraqis ('Irak') were at the bottom. The rate of employment in each group was below 50 per cent for both gender.

Figure 5.1: Employed immigrants 15-74 years after selected country of birth and gender as percentage of all in each group, 4th Quarter 2016



Source: Statistics Norway.

¹⁰⁵² B Olsen and A Ekeland, '60 prosent av innvandrerne er i arbeid' (Statistisk sentralbyrå 30 March 2017) (60 per cent of the immigrants are in employment) < www.ssb.no/arbeid-og-lonn/artikler-og-publikasjoner/60-prosent-av-innvandrerne-er-i-arbeid > accessed 21 September 2017.

Table 5.2: Employment, 15-74 years old according to immigrants' country background, 4th quarter 2016

	Absolute figure	Percentage
Whole population	2,591,903	65.6
Population excluding immigrants	2,199,337	66.7
Overall immigrants	392,566	60.2
The Nordic	45,761	72.6
Western Europe without the Nordic and Turkey	42,645	67.2
EU-Country within East Europe	118,179	70.1
East-Europe Country outside EU	33,322	62.3
North America and Oceania	6,527	61.6
Asia	99,960	51.9
Africa	33,756	42.3
South and Central America	12,416	60.6

Source: Statistics Norway (March 2017)¹⁰⁵³

According to above table, the percentage of Africans in gainful employment in the last quarter of 2016 was 42.3 per cent, compared with 51.9 per cent of Asians and 60.2 per cent of all immigrants in general.¹⁰⁵⁴ Immigrants from the Nordic countries and those from East European countries but who belong to the European Union were the most active group as far as employment is concerned. Their rate of employment stood above the national average i.e. it was 72.6 and 70.1 per cent against 66.7 per cent respectively.

The United Nations Committee on Economic, Social and Social Rights (the Committee) has expressed concern over incidents of discrimination against immigrants in many areas of Norwegian life, including access to employment.¹⁰⁵⁵ The Committee further challenged the government to *inter alia*, 'intensify its efforts' to tackle the situation, for example by adopting a

¹⁰⁵³ B Olsen and A Ekeland, 'Sysselsetting blant innvandrere, registerbasert' (Employment among immigrants, registered-based) < www.ssb.no/arbeid-og-lonn/statistikker/innvregsys/ > accessed 8 November 2017.

¹⁰⁵⁴ B Olsen and A Ekeland, 'Sysselsetting blant innvandrere, registerbasert' (Employment among Immigrants, Registered-Based (Statistics Norway 30 March 2013) < www.ssb.no/arbeid-og-lonn/statistikker/innvregsys/ > accessed 23 August 2017.

¹⁰⁵⁵ CESCR, *Concluding Observations on the Fifth Periodic Report of Norway* (13 December 2013, E/C.12/NOR/CO/5) para 7.

new action plan to prevent ethnic discrimination, promote equality, and ‘prevent and combat discrimination against persons with immigrant backgrounds’, particularly regarding access to the labour market. The Committee observed: ‘Despite a relatively low overall unemployment rate’, persons from immigrant backgrounds, in particular women, faced long-term unemployment, with persistent and significantly higher unemployment rates.¹⁰⁵⁶ The Committee recommended action including a systematic review of the impact of the measures taken to reduce unemployment, make vocational training more effective, and retrain and reintegrate the long-term unemployed.

In Sweden, the United Nations Committee on the Elimination of Racial Discrimination (CERD) noted that there was economic segregation with ‘a stark division in the type and areas of residence along ethnic and socioeconomic lines’... whose impact was disproportionately felt by ‘foreign-born persons’, particularly ‘Afro-Swedes and Muslims’.¹⁰⁵⁷ It was further observed that there were:

‘...stark discrepancies along ethnic and socioeconomic lines in access to employment between native Swedes and foreign-born persons, which prevails even after a long stay by the latter in Sweden and disproportionately affects the next generation. The Committee is particularly concerned by the increased likelihood that foreign born-persons will be unemployed, occupy unskilled, low-paying jobs, or live in a de facto segregated area, the consequences of which surfaced during the May 2013 riots which started in the Stockholm suburb of Husby...’¹⁰⁵⁸

The above observation is generalized among ‘foreign-born persons’, which includes refugees. In general, such reports and other statistical indicators provide *prima facie* evidence of the Gap. Just like in the case of *D.H and Others v. the Czech Republic*,¹⁰⁵⁹ ‘...where an applicant had established a difference in treatment the onus was on the respondent government to prove that it was justified’. Following that reasoning, the Governments of the Nordics may be tasked with providing proof of objective and reasonable justification, the *prima facie* evidence relating to

¹⁰⁵⁶ Ibid para 8.

¹⁰⁵⁷ United Nations, Committee on the Eliminations of Racial Discrimination (CERD), *Concluding Observations on the Combined Nineteenth to Twenty-first Periodic Reports of Sweden* (23 September 2013 CERD/C/SWE/CO/19-20) para 5.

¹⁰⁵⁸ Ibid.

¹⁰⁵⁹ Application Number 57325/00 (ECtHR , 13 November 2007) s138.

practices of direct and indirect discrimination on the grounds of the ethnic origin of refugees, and religion, for example.

The persistence of the Gap is not caused by non-reporting or lack of knowledge of the magnitude of its effects, nor is it the result of ‘lack of available resources’¹⁰⁶⁰ *per se*. In the case of Norway, the former Prime Minister (from 2005 to 2013), who became the Secretary General of the North Atlantic Treaty Organization (NATO) in 2014, was once quoted: ‘We have much, much more money than we can use’. Theoretically, every Norwegian had 1,000,000 Kroner (about \$127,000) in the Government Pension Fund Global (commonly known as the Norwegian Oil Fund), and 200 Norwegians had become billionaires. The Prime Minister’s comment could have been political rhetoric, but the Nordics’ figures for Gross Domestic Product (GDP), GDP per capita i.e. the sum of gross value added by all resident producers in the economy plus any product taxes and minus any subsidies not included in the value of the products. It is calculated without making deductions for depreciation of fabricated assets or for depletion and degradation of natural resources),¹⁰⁶¹ the total population and Gross National Income (GNI)/Purchasing Power Parity (PPP), all show the countries are in a strong financial position as far as the availability of resources is concerned.

¹⁰⁶⁰ E Winsnes, ‘Stoltenberg: Vi har veldig mye mer penger enn vi kan bruke’, Aftenposten (14 December 2013) (Stoltenberg: We have a lot more money than we can use) < www.aftenposten.no/norge/Stoltenberg---Vi-har-veldig-mye-mer-penger-enn-vi-kan-bruke-101326b.html#.UzMbazcyp5Y > accessed 26 March 2014.

¹⁰⁶¹ GDP per capita is gross domestic product divided by midyear population. Data are in current U.S. dollars (The World Bank).

Table 5.2: The Nordics' main economic indicators and comparisons 2015

<i>Country</i>	<i>GDP (millions of US\$)¹⁰⁶²</i>	<i>GDP per capita (US\$)¹⁰⁶³</i>	<i>Population (thousand)¹⁰⁶⁴</i>	<i>GNI per capita, PPP(US\$)¹⁰⁶⁵</i>
<i>Denmark</i>	295,091.33	51,989.30	5,676.00	49,240
<i>Finland</i>	231,949.65	42,311.00	5,482.01	42,600
<i>Norway</i>	386,578.44	74,400.50	5,195.92	65,430
<i>Sweden</i>	495,623.70	50,579.70	9,798.87	48,700

Source: World Bank

In simple terms, Gross Domestic Product (GDP) is the total value of goods and services produced by a country over a specific period, normally a year. It is an indicator of a country's economic health. Purchasing Power Parity (PPP), on the other hand, is a comparison of a country's purchasing power in other currencies; in other words, how much of a country's currency is needed to purchase a bundle or a basket of other currencies.¹⁰⁶⁶ Gross National Income (GNI) is the total of domestic and foreign output which a country's residents can rightly claim. It is an indication of whether a country's resources are retained within a country or are drained by foreigners through for example, transnationalism. Transnational activities are facilitated by modern time-space-compressing technologies e.g. internet and global air travel. The performance and position of the Nordics in all the above economic indicators is very good, given their small populations. One can rightly conclude, without reservation, that the availability of resources is not a structural issue or bottleneck capable of affecting the capacity of institutions to perform efficiently.

¹⁰⁶² World Bank national accounts data, and Organization for Economic Co-operation and Development, National Accounts data files < <http://data.worldbank.org/indicator/NY.GDP.MKTP.CD> > accessed 28 January 2017.

¹⁰⁶³ World Bank, National Accounts Data, and National Accounts data files < <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD> > accessed 04 February 2017.

¹⁰⁶⁴ The World Bank, 'Population, total' < <http://data.worldbank.org/indicator/SP.POP.TOTL> > accessed 06 February 2017.

¹⁰⁶⁵ World Bank, 'GNI per capita, PPP (Current International \$), International Comparison Program Database' < <http://data.worldbank.org/indicator/NY.GNP.PCAP.PP.CD> > accessed 06 February 2017.

¹⁰⁶⁶ For further understanding PPP, see World Bank Group, Fundamentals of Purchasing Power Parities < <http://pubdocs.worldbank.org/en/242881493822925477/PPP-brochure-2017-webformat.pdf> > accessed 21 September 2017.

Although most of these examples are from Norway, there are no specific reasons to believe that the employment opportunities for refugees in the rest of the Nordics is any better. Exogenous factors have been identified as the main culprit. These include, but are not limited to, imperfect labour market structures and practices, such as not advertising entry-level jobs; strong trade unions that protect the interests of the unionized work force against outsiders (entrants); the universal welfare system that protects all but indirectly creates dependency among its clients; and discriminatory policies in labour recruitment. Members of certain ethnic groups and religions are rarely called for interviews, and there are deep-rooted stereotypes and prejudices; in addition, there are factors such as the role of ‘welfare chauvinists’ and other anti-immigration politicians, and welfare administrators who discriminate against some groups of clients, especially in the way they allocate apprenticeships with employers likely to take staff on, etc. In other cases, refugees are provided with irrelevant courses. In the case of Norway, other challenges are the many rules, procedures and extensive bureaucracy which are claimed to be outdated.¹⁰⁶⁷ Politicians with power may lack the will to support policies that could mitigate the Gap while others only prevaricate. It is therefore important to ask how international human rights law can confront the challenges posed by the Gap?

The biggest challenge could be the lack of political will to prioritize the mitigation of the Gap. For example, by refusing to ratify the Optional Protocol¹⁰⁶⁸ to the International Covenant on Economic, Social and Cultural Rights, a State cannot be accountable for violation of, say, the right to work. Citizens’ rights to lodge a claim of violation of any of the Covenant right(s) with the Committee on Economic, Social and Cultural Rights, either individually or as a group, become null and void. Again, if a State party fails to fulfil its obligations as the Covenant stipulates, another State Party cannot take up the claim with the Committee. Inter-State communication no longer exist.¹⁰⁶⁹

¹⁰⁶⁷ Støren A Wedén ‘*Arbeidsministeren ut mot «regel-jungelen» i Nav – Mye av regelverket er gått ut på dato*’, VG (23 February 2016) (The Labour Minister is out against the ‘jungle of laws’: most of the regulations are outdated) < www.vg.no/nyheter/innenriks/nav/arbeidsministeren-ut-mot-regel-jungelen-i-nav/a/23622711/ > accessed 11 January 2017.

¹⁰⁶⁸ UNGA Res 63/117 (adopted 5 March 2009).

¹⁰⁶⁹ UNGA, A/RES/63/117 (5 March 2009) (Optional Protocol to the International Covenant on Economic, Social and Cultural Rights) Art 10.

Finally, even under ‘grave and systematic violations’¹⁰⁷⁰ of the Covenant rights, it becomes hard for the Committee to have reliable information on such State behavior.¹⁰⁷¹

On a rather positive note, Finland had ratified the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. However, there was not enough information available about cases where the Covenant provisions had been directly applied before the domestic courts.¹⁰⁷² The same concern was expressed in 2000 by the same Committee.¹⁰⁷³

Violations of economic and social rights are not new, and violators can be individuals as well as States. However, the onus is on States to find solutions by respecting, protecting, and fulfilling human rights obligations. States are the primary duty bearer if the realization of economic and social rights, like the right to work, is to be achieved. For example, the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights¹⁰⁷⁴ elaborate some of the ways in which human rights violations occur, which are acts of commission and omission mostly by State authorities.¹⁰⁷⁵ Having established that the Gap is a by-product of many complex issues, ranging from individual administrators’ characters to failed government policies, it is necessary to explore other ways in which the Gap can be fixed.

5.4 Possible redress, more bottlenecks

A definition of the violation of economic and social rights is found in the Maastricht Guidelines.¹⁰⁷⁶ In the Nordics, economic and social rights are protected and respected as

¹⁰⁷⁰ Ibid art 11(2). For a detailed analysis of the meaning of ‘Grave and Systematic’ Violations of Art 11(2), see Donna J Sullivan, ‘The Inquiry Procedure’ in M Langford, B Porter, R Brown and J Rossi (eds), *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (Pretoria University Law Press 2016) 77-146, 120-22.

¹⁰⁷¹ M Ssenyonjo, ‘Economic, Social and Cultural Rights: An Examination of State Obligations’ in S Joseph and A McBeth, *Research Handbook on International Human Rights Law* (Edward Elgar Publishing 2010) 36, 36.

¹⁰⁷² CESCR, *Concluding Observations on the Sixth Period Report of Finland* (17 December 2014 E/C.12/FIN/CO/6) para 6.

¹⁰⁷³ CESCR, *Consideration of Reports Submitted by States Parties Under Article 16 and 17 of the Covenant* (Concluding Observations of the Committee on Economic, Social and Cultural Rights, Finland, 1 December 2000 E/C.12/1/Add.52) para 12.

¹⁰⁷⁴ (1998) 20 *Human Rights Quarterly* 691.

¹⁰⁷⁵ M Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2009) 39.

¹⁰⁷⁶ The Maastricht Guidelines paras 11, 14-15.

constitutional rights. The right to a minimum core of content is strictly observed and is justiciable.¹⁰⁷⁷ There are no overt policies that blatantly and deliberately contravene the International Covenant on Economic, Social and Cultural Rights principles. However, discrimination that purposely or effectively nullifies or impairs the equal enjoyment or exercise of the Covenant on grounds of race (ethnicity), colour, language or religion, etc., is still hard to control and may result in acts of omission. As primary duty bearers, governments must search for and eliminate the actions and omissions that perpetuate the Gap.¹⁰⁷⁸ When States sign international treaties, there is a normative expectation that they have agreed on the content and standards of those treaties. When Contracting States move further to ratify such treaties, they send lucent signals that they are committed to the full implementation and application of the treaties' provisions. The effectiveness of any treaty depends on the commitment the signatories give it, even under budgetary constraints.¹⁰⁷⁹ Reporting using reliable data could be a starting point because it indicates the significance accorded to the issue of human rights in a country.

5.4.1 System reporting

Because States accept and submit to the jurisdiction of human rights bodies, failure to fulfil human rights obligations as stipulated in international human rights treaties can be reported to the relevant Committees. A violation of a covenant, convention, or treaty right, like the right to work, can be reported to the Committee on Economic, Social and Cultural Rights (CESCR) because it has binding power over the signatory State. It should also be kept in mind that the CESCR's primary purpose is not only to supervise and control treaty obligations but also to monitor the implementation of socio-economic rights manifested in the ICESCR. States are obliged to submit reports 'on the measures which they have adopted and the progress made in achieving the observance of the rights' recognized in the Covenant; and failure to do so constitutes a violation of the Covenant.¹⁰⁸⁰ For example, Finland was requested to 'intensify its

¹⁰⁷⁷ *The Social Services Act of Norway Number 131* (18 December 2009); the *Swedish Social Services Act (2001: 453)*; the *Danish Consolidation Act on Social Services, Consolidation Act Number 1093* (5 September 2013); the *Finnish Social Welfare Act (1301/2014)*.

¹⁰⁷⁸ The Maastricht Guidelines para 16.

¹⁰⁷⁹ On the subject of commitment, see generally M Mikkola, *Social Human Rights of Europe* (Karelactio 2010) 65.

¹⁰⁸⁰ M Craven, *The International Covenant on ESCR: A Perspective on its Development* (Clarendon Press 1995) 57; ICESCR art 16(1).

efforts to prevent and combat the persistent discrimination against persons with immigrant backgrounds...' and that the State party should adopt 'specific and targeted measures to address the problems faced by all minorities in having access to employment...and undertake 'awareness-raising campaigns'.¹⁰⁸¹

On a regional level, the Council of Europe (CoE) can also hear complaints about violations of rights envisaged in the European Social Charter and under the Collective Complaints Procedure (CCP) as modified by the Additional Protocol.¹⁰⁸² However, under the Collective Complaints Procedure, only collective complaints, not individual ones, are permissible; and only by States that have accepted the procedure under the Charter's provisions.¹⁰⁸³ Organizations that can complain include, *inter alia*, the European Trade Union Confederation, the Union of the Confederation of Industry and Employers of Europe, and international non-governmental organizations (NGOs).¹⁰⁸⁴

The collective complaints system is advantageous in that it has no time limit for lodging a 'complaint of non-compliance',¹⁰⁸⁵ and the requirement for the exhaustion of domestic remedies does not apply because of the assumption of the lack of availability of domestic remedies.¹⁰⁸⁶ Currently, it seems impractical for refugees to appeal to the Council of Europe (CPP) because they are not on the list of those supposed to apply the complaints procedure as they (refugees) are not unionized.

In the Nordics, only Denmark does not participate in the CCP, as it has not formally recognized the procedure. Norway, although not a member of the European Union, is nonetheless bound by the Collective Complaints Procedure. For example, by January 2017, eight

¹⁰⁸¹ CESCR, *Concluding Observation on the Sixth Period Report of Finland* (17 December 2014 E/C.12/FIN/CO/6) 12.

¹⁰⁸² Council of Europe, *Additional Protocol to the European Social Charter Providing for a System of Collective Complaints* (adopted 9 November 1995 entered into force 1 July 1998 European Treaty Series No. 158).

¹⁰⁸³ For a detailed analysis, see RR Churchill and U Khaliq, 'The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?' (2004) 15 (3) *European Journal of International Law* 417.

¹⁰⁸⁴ *Ibid.*

¹⁰⁸⁵ *Ibid* (433-4).

¹⁰⁸⁶ *Ibid* (434)

cases had been successfully handled, including that of *Bedriftsforbundet v. Norway*,¹⁰⁸⁷ where a new resolution¹⁰⁸⁸ was passed. Finland had had 24 cases and Sweden 14.¹⁰⁸⁹

5.4.2 Administrative redress

The persistence and intractability of the Gap makes it truly challenging to try to devise forms of effective remedies, whether current or future-orientated. Although it is very hard to directly assign blame to statutory authorities, they are nonetheless accountable for the persistence of the Gap. There are acts of omissions and negligence (or indifference) in the way the Gap is dealt with. In Norway, for instance, the Norwegian Labour and Welfare Service (NAV) compiles almost all statistics regarding all citizens, including refugees suffering from long-term unemployment and those depending on welfare benefits.¹⁰⁹⁰ The information collected includes, the level and type of education, current and previous work experience, including other competencies. Information on health, marital status and number of children, etc., can easily be accessed by the NAV employees. In other words, Norwegian Labour and Welfare Service (NAV) has access to the capacities of its clients, which can be compared to an ‘integrity databank’.¹⁰⁹¹

The NAV, on the other hand, has access to many of the available jobs and apprenticeships, like carpentry, baking, cooking, kindergarten, homecare and nursing, etc. It knows how the labour market functions and works, and is aware of the extent and level of prejudice, discrimination and stereotypes existing in society that partly contributes to discrimination against people from a refugee background, especially those from specific continents and those of certain religions. By offering ‘skewed’¹⁰⁹² services to refugees and other non-European immigrants, the Norwegian Labour and Welfare Service also practises

¹⁰⁸⁷ *Complaint Number 103/2013*, 17 May 2016, European Committee of Social Rights

¹⁰⁸⁸ European Union, Committee of Ministers, *Resolution CM/ResChS (2016)* 6.

¹⁰⁸⁹ European Social Charter Caselaw Database (HUDOC Charter).

¹⁰⁹⁰ AB Djuve and KR Tronstad, ‘*Innvandrere i praksis: om likeverdig tjenestetilbud i NAV*’ (*Fafo-Rapport 2011:07*, Allkopi AS) (Immigrants in apprenticeship: about equal value service offer in the Norwegian Labour and Welfare Service, Fafo Report 2011: 07)

¹⁰⁹¹ United Nations Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States. Vetting: An Operational Framework* (2006 HR/PUB/06/5), 17.

¹⁰⁹² AB Djuve and KR Tronstad *ibid* (n 1090).

discrimination. When the NAV offers irrelevant short-term courses to refugees, or sends them to employers with the prior knowledge that the employers are interested only in free labour and will not offer employment at the end of the apprenticeship or training period, it may become an accomplice in discrimination. It is not known whether the NAV carries out any vetting of its employees, or that of the employers accepting trainees, or of course-providers, in the same way that the authorities scrutinize refugees for purposes of exclusion from international protection.¹⁰⁹³ The current system means the same refugees can remain on the books of the NAV for decades, and no one is answerable for the situation. The way the NAV deals with the Gap can lead to questions regarding its capacity as the main public institute dealing with the issue, and regarding the integrity of some of its employees.

Local authorities, as the representatives of the government, have obligations to mitigate the Gap. However, operating by the NAV's philosophy that 'the best welfare policy is employment', with a focus 'on people's potential and abilities – not their limitations',¹⁰⁹⁴ it can be logical for the NAV to concentrate on clients who have the potential to get work and become active, rather than those who are 'quiescent or inactive but on benefits'.¹⁰⁹⁵ It is a Catch-22¹⁰⁹⁶ situation, a paradox bordering on a dilemma. While the NAV wishes for there to be no inactive persons on welfare benefits, it works on a fixed budget and many complex rules governing welfare. Focusing on persons with multiple barriers, like refugees, will cost the NAV more as they will still not find jobs. The overall labour market will still reject them. If, on the other hand, it focuses on those whose employment possibilities are higher, such as Europeans, it can save resources because the labour market works in their favour. This could partly explain why, even with the best of intentions, many refugees stay on benefits for extended periods despite their education, training and experience.

¹⁰⁹³ On the question of vetting, many authoritarian regimes have extensive secret files on individuals but most of that information is suspect, it has to be treated with great caution, *ibid* (n 901) 17. But due to heightened threat from international terrorism, it is doubtless that democratic countries too have no secret files on refugees. Could there be a secret databank on refugees containing 'unreliable' information which employers vet?

¹⁰⁹⁴ Erik Stene, *New Labour and Welfare Administration* (Assistant Director Country Line, Paper presented at Rotterdam, 27 October 2011) < www.plusconfidence.nl/sites/default/files/Presentation%20Erik%20Stene%20country%20specific.pdf > accessed 2 November 2017.

¹⁰⁹⁵ *Ibid* at 2.

¹⁰⁹⁶ J Heller, *Catch 22* (Vintage, London 2011).

5.4.3 Capacity, integrity, and vetting

The capacity of the Norwegian Labour and Welfare Service (NAV)'s employees can also be put under the spotlight. Capacity is defined as the qualities that enable personnel to fulfil the technical tasks of the institution's mandate, while integrity refers to the qualities that enable the institution to fulfil the given mandate, based on the respect of fundamental human rights, and professional and legal standards.¹⁰⁹⁷ Vetting, on the other hand, is concerned with 'assessing integrity to determine suitability for public employment'.¹⁰⁹⁸ Although those concepts are more important in 'reforming public institutions in countries in transition from authoritarianism or conflict to democracy and peace',¹⁰⁹⁹ they can also be relevant to any public institutions even in stable and mature democratic countries, like the Nordics. This is because such institutions face challenges of capacity, when employees are allocated more clients than they can reasonably handle, and work within a fixed budget. For example, 62 per cent of the NAV-employees interviewed complained about heavy workload, and it was one of the factors which reduced the chances to satisfactorily support non-European users.¹¹⁰⁰

Most local administrators' employees are Nordics by ethnicity. They deal with new groups of immigrants, many of whom are refugees, who come from far and wide, with different ethnic background. Their overall culture or social mores are epitomised by their initial different language, and their religion is also likely to be at variance with that of the local administrators. Some local administrators may be prejudiced against certain ethnic or religious groups, while others may not be in favour of immigration at all, especially that of refugees. It is even possible that some employees work against some of the objectives of their own agencies, as an act of indirect resistance. There could be incidents of associative discrimination, where the employees fear being associated with refugees. Some NAV-employees may not even be understanding well, and others may be resisting, the abrupt population changes occurring in the country. Consequently, less supervision of refugees may be carried out during internships, for example. In

¹⁰⁹⁷ United Nations, Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States. Vetting: An Operational Framework* (HR/PUB/06/5). See 'Introduction' by Louise Arbour.

¹⁰⁹⁸ Ibid 4.

¹⁰⁹⁹ Ibid 3.

¹¹⁰⁰ AB Djuve and KR Tronstad, Fafo-Report 2011:07, 9.

such situations, vetting may be necessary for employees working in such an important public institution, with refugees as a priority group. Generally, can someone be employed to guide another to find work? Hypothetically, what if all the users of NAV-services manage to get employment, will it not cause unemployment on another section? Doesn't it make some little sense to have a few users in the system for a time so that some keep their jobs?

Justice, on the other hand, requires honesty from employers (private or public) on why and how they discriminate against refugees in recruitment, government services, etc.; it may also require that this discrimination is officially investigated and that those responsible are held to account and punished if need be. Discriminators can publicly promise not to repeat their conduct. They can be made aware of the negative consequences of their acts. However, it is often claimed that most decision-makers are not aware of their discriminative practices.

Violations of economic and social rights are justiciable because human rights are indivisible.¹¹⁰¹ Domestic courts and the anti-discrimination ombudsmen can deal with issues of discrimination. Under the Gap, practices that discriminate against refugees in areas of labour recruitment can be expeditiously dealt with by national courts. Consequently, a claimant 'shall have effective remedy'¹¹⁰² especially if a right is self-executing, that is, 'capable of immediate application by judicial and other organs' of the national legal systems and provision.¹¹⁰³ Note that Article 13 of the European Convention on Human Rights is 'absolute' in nature; no authority is allowed to adopt legislation against effective remedy if a human right is violated.¹¹⁰⁴

Violations of or non-respect for constitutional rights, like the right to work, can also be justiciable. The constitution of Norway categorically states that: 'It is the responsibility of the authorities of the State to create conditions enabling every person capable of work to earn a living by his work'.¹¹⁰⁵ The Danish constitution too is crystal clear, stating that: 'Efforts should be made to afford work to every able-bodied citizen on terms that will secure his existence.'¹¹⁰⁶

¹¹⁰¹ The World Conference on Human Rights, *Vienna Declaration and Programme of Action*, adopted 25 June 1993.

¹¹⁰² International Covenant on Civil and Political Rights, Article 2 (3) (a); CESCR, *General Comment Number 3*, para 5; European Convention on Human Rights, art 13. See also *Stanev v Bulgaria* (Application Number 36760/06) [2012] 192; *McFarlane v Ireland* (Application Number 31333/06) [2010] 128.

¹¹⁰³ CESCR, *General Comment Number 3*; ICESCR art 3.

¹¹⁰⁴ Jason NE Varuhas, *Damages and Human Rights* (Hart Publishing 2016) 335.

¹¹⁰⁵ s110.

¹¹⁰⁶ Article 75(1).

The 1999 constitution of Finland states that: ‘The public authorities shall promote employment and work towards guaranteeing for everyone the right to work’.¹¹⁰⁷ Put another way, both the Norwegian and Finnish constitutions clearly show that the statutory authorities have a clear obligation to intervene in the labour market if individuals are to live by their labour.

The Danish constitution can be interpreted to mean that there is ‘someone’ or ‘something’ that is tasked with the duty of providing work to every citizen who is able to work. Sweden, on the other hand, does not include the right to work as a constitutional right. However, this does not exonerate it from its international obligations i.e. it has ratified the International Covenant on Economic, Social and Cultural Rights, the European Social Charter and the Revised European Social Charter. However, the extent to which such rights, for example, the right to work, dignity, etc., are justiciable and therefore capable of vindication can be problematic. It has been argued that such rights are vague¹¹⁰⁸ and imprecise; while courts have constantly failed to ‘give judicial consideration’ to such rights, rendering them ‘largely meaningless in practice’.¹¹⁰⁹

But, if *the right to work*¹¹¹⁰ is violated by, say, discriminatory practices, competent national tribunals and other State institutions shall provide the victim with effective protection and remedies.¹¹¹¹ The victim has a ‘right to seek from such tribunals just and adequate reparation for any damages suffered as a result of such discrimination.’¹¹¹² What is protected is ‘human rights’, which includes economic, social and cultural rights, inter alia. Failure by a doorman to allow a Danish national of Iranian origin entry into discotheque, for example, led the application of Article 6 of the Convention on Racial Discrimination.¹¹¹³ In addition, State authorities were

¹¹⁰⁷ s18.

¹¹⁰⁸ O O’Neil, ‘The Dark Side of Human Rights’ 81(1) *International Affairs* (Royal Institute of International Affairs 1994) (Sub-Saharan Africa, March 2005) 427-39 in L Liora, C McCrudden and N Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014) 300.

¹¹⁰⁹ F Coomans, ‘Some Introductory Remarks on the Justiciability of Economic and Social Rights in a Comparative Constitutional Context’ in Coomans (ed), *Justiciability of Economic and Social Rights* (Intersentia 2006) 1, 2 in P O’Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2012) 1. See also C O’Cinneide, ‘The Problem of Social Rights – Uniformity and Diversity in the Development of Social Rights Review’ in L Liora, C McCrudden and N Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014) 299-317, 307-11.

¹¹¹⁰ Convention on Racial Discrimination, art 5 (e) (i).

¹¹¹¹ *Ibid.*, art 6.

¹¹¹² *Ibid.*

¹¹¹³ *B.J. v Denmark*, CERD/C/56/D/17/1999 [2000].

accused of failure to provide effective satisfaction and reparation. The domestic court had argued that the author could not claim ‘pecuniary compensation’ because ‘it was not of such grave or humiliating character as to justifying the granting of’ such compensation.¹¹¹⁴ It can thus be concluded that if equality and non-discrimination provisions are applied expansively, economic and social rights can be protected at appreciable levels.¹¹¹⁵

5.4.4 Problems of enforcement

The right to work, together with other economic and social rights, is generally assumed to be too difficult to claim in a court of law in cases where it has been violated.

Philosophically, it has been claimed that such rights are not real in any meaningful sense;¹¹¹⁶ are only aspirational goals to be realized over time;¹¹¹⁷ cannot be judicially enforced by a democratically elected government as they are at variance with democracy.¹¹¹⁸ They fundamentally ‘sap at the sinews’ of democracy by ‘undermining the constitutionally mandated separation of powers if they are to be judicially enforced’.¹¹¹⁹ It is also claimed that fulfilling economic and social rights, like the right to work, can absorb huge proportions of a country’s budget. There also still exists a dichotomous battle between positive and negative rights, the limited capacity of courts, especially in issues involving national budgets, and the ‘nebulous idea

¹¹¹⁴ P Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (OUP 2016) 418. See also *B.J. v Denmark*, CERD/C/56/D/17/1999 [2000] para 6.2.

¹¹¹⁵ JN Woods, ‘Emerging Paradigms of Protection for “Second-Generation” Human Rights’ (2005) 6 *Layola Journal of Public Interest Law* 103 in P O’Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2012) 179.

¹¹¹⁶ A Neier, ‘Social and Economic Rights: A Critique’ (2006) 13 (2) *Human Rights Brief* 1; E Weede, ‘Human Rights, Limited Government and Capitalism’ (2008) 28 *Cato Journal* 35 in P O’Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge, 2012) 9; C Gearty, *Principles of Human Rights Adjudication* (OUP 2004) 26.

¹¹¹⁷ M Dennis and D Stewart, ‘Justiciability of Economic, Social and Cultural Rights: Should there be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?’ (2004) 98 *American Journal of International Law* 462 in Paul O’Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2012) 10.

¹¹¹⁸ B Friedman, ‘The Counter-Majoritarian Problem and the Pathology of Constitutional Scholarship’ (2001) 95 *North-Western University Law Review* 933 in P O’Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2012) 11.

¹¹¹⁹ G Hogan, ‘Judicial Review and Socio-Economic Rights’ in P O’Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2012) 9.

of non-justiciability'. However, such arguments are strongly countervailed in Chapter 3 of this thesis, which deals with the right to work.¹¹²⁰

On the issue of resources, all rights need resources if they are to be respected, protected, promoted, and fulfilled. However, the rights to freedom from torture and not to be held in slavery, for example, are cost-free to the would-be perpetrator. But again, it has been noted that such arguments claiming that negative rights are resource-free and positive rights are resource-intensive are 'more hyperbolic than substantive'.¹¹²¹ Empirically, it has been shown that enforcing economic and social rights, including the right to work, for instance, does not obligate a government 'to spend itself into the poorhouse'.¹¹²² The issue of resources is convincingly addressed by the Limburg Principles, which state that the effective use of available resources does not depend on them being increased, while also holding that increases in resources and the development of society's resources are necessary conditions for progressive achievements.¹¹²³ The positive-negative dichotomy no longer holds water. 'Rights cannot coherently be distinguished by the kind of duty to which they give rise'.¹¹²⁴ Delineating substantively the obligations that purportedly arise from respect for human rights, can be hard work.¹¹²⁵

¹¹²⁰ G Hogan, 'Directive Principles, Socio-Economic Rights and the Constitution' (2001) 36 *Irish Jurist* (n.s.) 174, 187 in P O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2012) 12.

¹¹²¹ P Hunt, *Reclaiming Social Rights: International and Comparative Perspectives* (Aldershot: Dartmouth, 1996) 55 in P O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2012) 13.

¹¹²² A Mäkinen, 'Rights, Review and Spending: Policy Outcomes with Judicially Enforceable Rights' (2001) 39 *European Journal of Political Research* 23, 43 in P O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2012) 13.

¹¹²³ Principles 23 and 24; ICESCR Article 2(1).

¹¹²⁴ S Fredman, 'Human Rights Transformed: Positive Rights and Positive Duties' (OUP 2008), 67 in P O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2012) 14.

¹¹²⁵ House of Lords/House of Commons Joint Committee on Human Rights, *The International Covenant on Economic, Social and Cultural Rights* (Twenty-First Report of Session 2003-04, HL paper 183, HC 1188, Published 2 Nov 2004) 11 in P O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2012) 14.

5.4.5 Judicial redress and capacity of courts

The experience of the Gap can lead refugees to seek legal remedies by going to court. However, courts are poorly suited to effectively handle claims resulting from violations of economic and social rights. For example, issues of ‘judicial competence’ and ‘judicial legitimacy’ makes human rights adjudication problematic.¹¹²⁶ Taking authorities to court for failure to secure a job for a plaintiff, even after a decade, may be a futile exercise. The evidence required by the courts may be hard to come by. Expert knowledge is required if evidence is going to be unbiased.¹¹²⁷ However, judges are not expected to be ‘policy wonks’ in matters of policies and resource allocation, but rather to assess the extent to which the authorities and other actors are complying with legal obligations.¹¹²⁸

Matters can be more complicated in an adversarial jurisdiction, where controlling for bias between opposing parties may cause dilemmas. Furthermore, the facts of the case must be well understood before a conclusion can be reached by the courts. Policy-makers must decide between competing choices, especially where the availability and allocation of resources are concerned. A culture of ‘adversarial legalism’, where ‘litigation’ breeds ‘more litigation’, ‘conflicting decisions, legal complexity and legal uncertainty’, may escalate.¹¹²⁹ It can take a lengthy period to successfully litigate some economic and social cases if courts assume to control the ‘bureaucracies’.¹¹³⁰ For example, in a special education case, it took New York City 24 years to resolve the impasse.¹¹³¹ Another case dragged on from 1985 to 2011 while other cases took

¹¹²⁶ C McCrudden, ‘The Pluralism of Human Rights Adjudication’ in L Liora, C McCrudden and N Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014) 1-27, 15.

¹¹²⁷ The subject of capacity is discussed well in M Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008) 35.

¹¹²⁸ C Scott and P Macklem, ‘Constitutional Ropes of Sand or Justiciable Guarantees: Social Rights in a New South African Constitution’ (1992) 141 (1) *University of Pennsylvania Law Review* 1 in M Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* ibid 35.

¹¹²⁹ R Kagan, ‘Adversarial Legalism: The American Way of Law’ cited by King, ‘American Exceptionalism over Social Rights’ in L Liora, C McCrudden and N Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014) 357- 377, 371.

¹¹³⁰ R Sandler and D Schoenbrod, ‘Democracy by Decree: What Happens When Courts Run Government’ cited by Jeff King, ‘American Exceptionalism over Social Rights’ in L Liora, C McCrudden and N Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014) 357- 377, 371.

¹¹³¹ J King, ‘American Exceptionalism over Social Rights’ in L Liora, C McCrudden and N Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014) 357- 377, 371.

nine, six, etc. years.¹¹³² This complicates the process of crafting functional remedies through courts. Even if a violation is overt, clear and the effects are serious; and the authorities seem to lack precision while rectifying the situation; culpability can be traced back to the authorities; and the government can shield the order of resource management, courts can still have difficulty in passing judgments in favour of victims of the Gap.¹¹³³ The cases below, however, are illustrative as how court decisions can guide government authorities to intervene in order to protect social and economic rights.

In the *Asylum Seekers Benefits* case,¹¹³⁴ the Constitutional Court of Germany concluded that the country's Asylum Seekers Benefits Act was not compatible with the fundamental right to a dignified minimum existence. Since 1993, the Court noted, the benefits had remained fixed yet the cost of living had increased significantly, and the amount itself had not been calculated using a realistic, needs-oriented methodology.¹¹³⁵ The Court intervened on behalf of asylum seekers' rights since authorities had not shown much concern. Legally, an asylum seeker's dignity must be protected although there is no guarantee that the authorities will recognize the person as a refugee in future. Can it not be argued that the Nordic courts should intervene on behalf of the de facto refugees under the Gap? The argument is simple: even under uncertainties for failure due to unknown consequences of judgments and the need for adaptation, like in the case of *Missouri v Jenkins*,¹¹³⁶ 'the institutional integrity of judging creates inertia, because no judge wants to declare rights on Monday and abandon them by Friday'.¹¹³⁷ The case was about desegregating Kansas City Schools, where Judge Clark mandated the adoption of a quota for students

¹¹³² J King, 'American Exceptionalism over Social Rights' in L Liora, C McCrudden and N Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014) 357- 377, 372.

¹¹³³ See generally, M Langford, 'Judging Resource Availability', in Squires, M Langford and Thiele (eds), 'The Road to a Remedy: Current Issues in Litigation of ESCR' cited in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* ibid 37.

¹¹³⁴ BVerfG, 1 BvL 10/10 (Judgement of 18 July 2012).

¹¹³⁵ See also M Wesson, 'The Emergency and Enforcement of Socio-Economic Rights' in L Lazarus, C McCrudden and N Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014) 281-97, 284.

¹¹³⁶ 515 US 70 (1995). See also J King, 'American Exceptionalism Over Social Rights' in L Liora, C McCrudden and N Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing, 2014) 357-377. King gives many critical reasons why social and economic rights must generally be secured even in a country like the United States of America.

¹¹³⁷ J King, 'American Exceptionalism Over Social Rights' in L Liora, C McCrudden and N Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014) 357-377, 373.

according to their skin colour.¹¹³⁸ Despite their desire to attend schools of their choice and the availability of such seats, seats for students of a certain colour remained vacant because their names were always on the waiting list. The judgment had thus caused uncertainty and had disrupted the status quo. If quotas are introduced in working places, will they not reduce the number of refugees under the Gap? Will such quotas disrupt the status quo? Why not adopt the quota system and then wait for the consequences?

In *Hartz IV*,¹¹³⁹ the Germany Constitutional Court, after assessing the constitutionality of the provisions governing the *Hertz IV* benefits, the legislature was challenged on the procedures used to determine the concerned benefits. The procedure had to be specific, needs-oriented, realistic, transparent and the data had to be reliable.¹¹⁴⁰ Respect for human dignity as a fundamental right was one of the concerns. In *Campaign for Fiscal Equity v New York*,¹¹⁴¹ the New York Court of Appeals ordered the State to spend an additional \$1.93 billion per year to remedy educational inequality in New York's public schools' system. The Appellate Division further 'directed' the legislature to 'consider' an annual increment of funds between US\$4.7 billion and US\$5.63 billion.¹¹⁴² The legislature was further 'ordered' to release a one-off capital improvement spending program worthy US\$9.179 billion.¹¹⁴³

In summary, under certain circumstances, even a parsimonious country like the United States of America which thinly commits itself to respect of social and economic rights, can accept to abide by a court ruling which has big budgetary implications. Potentially good results have been archived. Jeff King noted several: increased funding, where 'court-ordered reform raises spending in the poorest districts by eleven percent, raises spending in the medium district by

¹¹³⁸ Ibid.

¹¹³⁹ BVerfG, 1 BvL 1/09 (Judgment of 9 February 2010) (Germany).

¹¹⁴⁰ M Wesson, 'The Emergency and Enforcement of Socio-Economic Rights' in L Lazarus, C McCrudden and N Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014) 281-97, 284.

¹¹⁴¹ 86 NY 2d 307, 316, 317 (Ct App 1995) (United States); *Campaign for Fiscal Equity v State of New York*, 719 NYS 2d 475 (Sup Ct 2001) (United States). See also L Lazarus, C McCrudden and N Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014) Chap 14 and 18.

¹¹⁴² M Wesson *ibid* 293,

¹¹⁴³ Ibid.

eight percent, and leaves spending in the wealthiest districts unchanged’;¹¹⁴⁴ the legislature is compelled (influenced, inspired) to enact new reforms in favour of the right¹¹⁴⁵ that further reduces inequalities,¹¹⁴⁶ say, in earnings and improve administrative practices by public authorities. In general, the role of courts to adjudicate cases involving human rights violations, be social and economic, cannot be ignored since there is no strong empirical evidence against the proposition.

Caution should however be observed. Jason Varuhas analyzed the issue thoughtfully and concluded that empirical evidence was inadequate, it was difficult to predict the impact of ‘damages’ on bureaucratic/administrative behavior, etc.¹¹⁴⁷ Determining what the effects of positive measures through court action will have on bureaucratic behavior is very hard.¹¹⁴⁸ Empirical research on the subject matter is dearth and the studies on impacts of monetary payment are generally ‘modest in scope and hedged about with numerous qualifications and caveats’, and caution must be taken before drawing general conclusions about the ‘determinants of decision-making beyond the particular bureaucratic cultures’ under investigations.¹¹⁴⁹

5.4.6 Separation of powers argument

Under the Gap, refugees can bring lawsuits if there are incidents where the authorities act with negligence. However, whether judges can rule on the merits of such cases, assuming they meet the criteria of admissibility, may depend on the way the judiciary interacts with the executive and the legislature. The doctrine of the separation of powers, where courts can only rule in legal matters, makes it hard, if not impossible, for courts to judiciously enforce economic and social rights. It is often argued, *inter alia*, that it is the executive that negotiates, and the

¹¹⁴⁴ Murray, Evans Schwab, ‘Education-Finance Reform and the Distribution of Economic Resources’ cited by J King, ‘American Exceptionalism over Social Rights’ in L Liora, C McCrudden and N Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014) 357-277, 368.

¹¹⁴⁵ J King *ibid*.

¹¹⁴⁶ J King, ‘American Exceptionalism over Social Rights’ in L Liora, C McCrudden and N Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014) 357-277, 369.

¹¹⁴⁷ Jason NE Varuhas, *Damages and Human Rights* (Hart Publishing 2016) 383-404.

¹¹⁴⁸ *Ibid*, 383.

¹¹⁴⁹ Markesinis et al, cited in Jason NE Varuhas, *Damages and Human Rights* (Hart Publishing 2016) 383.

legislature that normally transposes an international treaty into domestic law; and as such, it would be a subversion of power if national courts assumed the role of other branches of government to indirectly or dishonestly introduce international law.¹¹⁵⁰ Beginning with judicial procedure, where a case has to go through processes like admissibility, justiciability, merit, remedy, etc., such a process is not, as often presented, rigid and static.¹¹⁵¹ Quoting Richard Fallon, courts:

‘... view justiciability, substantive, and remedial doctrines as components of an integrated package and... seek an optimal balance among them rather than viewing each in isolation...determining which claims to uphold on the merits, courts will almost irresistibly tend to peek ahead at the remedial consequences and weigh their acceptability.’¹¹⁵²

However, much as the fear that courts will not adjudicate on economic and social rights may not be real, it is nonetheless there. National or domestic courts may want to be judicially independent of, for example, international human rights law, the main sources being the UDHR, ICESCR and ICCPR.¹¹⁵³ For example, Sweden, a State party to the ICESCR, failed to give the Covenant full effect in its domestic law and as such, no national court could directly invoke the Covenant.¹¹⁵⁴ The explanation is that an international treaty cannot automatically apply as Swedish law before it is transformed into domestic legislation or incorporated through special enactment.¹¹⁵⁵ It was a kind of dilemma where a country ratified the Covenant but it could not be applied directly by domestic courts. It was only in case law, ‘as established by a number of rulings of the Supreme Court – Swedish domestic legislation and any amendments of it must be interpreted in accordance with Sweden’s international undertakings’,¹¹⁵⁶ so was the observation.

¹¹⁵⁰ P O’Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2012) 25.

¹¹⁵¹ R Fallon, ‘The Linkage Between Justiciability and Remedies and Their Connection to Substantive Rights’ (2006) 92 *Virginia Law Review* 633, 705 cited in P O’Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2012) 12.

¹¹⁵² R Fallon, *ibid* 642.

¹¹⁵³ M Freeman and G van Ert, *International Human Rights Law* (Irwin Law 2004) 69 in *ibid* 22.

¹¹⁵⁴ CESCR, *Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, Sixth periodic report of States parties due in 2013* (16 March 2015, E/C.12/SWE/6) para 2.

¹¹⁵⁵ *Ibid* para 3.

¹¹⁵⁶ *Ibid* para 5.

5.4.7 The value of rights argument

Although the value of human rights norms is self-evident, entrenching such rights in national constitutions, adopting legislative or administrative provisions, providing effective remedies and other means of redress once such rights are violated, is still controversial.¹¹⁵⁷ Courts, through domestic constitutions and specific legal systems, are designed ‘to govern a specific polity’, therefore embracing international law to influence, interpret and thereafter apply it as domestic law is opposed.¹¹⁵⁸ International law can, in addition, be overambitious and equivocal, creating uncertainties. Furthermore, domestic courts do not wish to rely on international law because it can lead to loss of their sovereignty. Trenchantly, courts will defend their ‘uniqueness’, ‘democracy’ and ‘indeterminacy’ so as to avoid the reach of international law.¹¹⁵⁹ Symptomatically, the fears are concerns of foreign domination, ‘fear of the unknown’, but such fears may be exaggerated.¹¹⁶⁰ Still, the extent to which international human right law norms bind domestic courts is questionable since the former is mainly persuasive, not binding.

But as observed by Knop, international law can blur into comparative law to become ‘transjudicialism’,¹¹⁶¹ which becomes an alternative form of the ‘binding-non-binding approach’ that has traditionally governed the relationship between national and international law.¹¹⁶² Further, courts cannot just ignore international norms developed by treaty monitoring bodies because they represent ‘a relevant source of insight on the human rights issues they address’.¹¹⁶³

¹¹⁵⁷ H Steiner, P Alston and R Goodman, *International Human Rights in Context: Law, Politics, Morals* (3rd edn OUP 2008) 263.

¹¹⁵⁸ P O’Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2012) *ibid*.

¹¹⁵⁹ MA Weisburd, ‘Using International Law to Interpret Domestic Constitutions – Conceptual Problems: Reflections on Justice Kirby’s Advocacy of International Law in Domestic Constitutional Jurisprudence’ (2006) 21 *American University International Law Review* 365 in P O’Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2012) 25.

¹¹⁶⁰ G Neuman, ‘Human Rights and Constitutional Rights: Harmony and Dissonance’ (2003) 55 *Stanford Law Review* 1863, 1890.

¹¹⁶¹ K Knop, ‘Here and There: International Law in Domestic Courts’, (2000) 32 *New York University Journal of International Law and Politics* 515 in Paul O’Connell *ibid* 26.

¹¹⁶² HP Glenn, ‘Persuasive Authority’ (1987) 33 *McGill Law Journal* 261 in P O’Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2012) 12.

¹¹⁶³ G Neuman, ‘Human Rights and Constitutional Rights: Harmony and Dissonance’ (2003) 55 *Stanford Law Review* 1863 in P O’Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2012) 27.

International treaties contain elaborative reasoning of the functioning and normative insights of human rights, especially on cases presenting ‘novel issues’ that may baffle domestic courts.¹¹⁶⁴

The principles and norms developed by international treaty-monitoring bodies are pragmatic and persuasive, and can therefore help domestic courts to articulate domestic solutions to new claims resulting from violations of economic and social rights. The Universal Declaration of Human Rights can, for example, be referred to if issues involving injury to resettlement refugees’ self-worth and self-esteem (dignity) are brought into domestic courts. The International Covenant on Economic, Social and Cultural Rights explains quite convincingly the ‘nature of the obligations of the State’ that ratified it,¹¹⁶⁵ and the right to work,¹¹⁶⁶ *inter alia*. Through the work of the General Comment by the Committee on Economic, Social and Cultural Rights, the implementation and monitoring of the ICESCR is effected i.e. put into practice by analyzing reports submitted by States. The General Comments develop both substantive and procedural aspects of the Committees that eventually result in new jurisprudence which domestic courts can, quite safely, apply domestically. Added to the UDHR and the ICESCR are the Limburg Principles, the Maastricht Guidelines, Concluding Observations on States Reports, the Periodic Reviews, and the Optional Protocol to the ICESCR. Domestic courts can hardly deny the existence of the reasoning developed by such international treaties. However, negative rights also demand resources too. If a government fails to invest in positive rights, for example, the provision of welfare services, it must invest in fighting crime, one of the many natural consequences of ‘misallocation’ of available resources.

5.4.8 Positive obligations, duties, and actions

A positive obligation requires States (authorities) to take positive steps to protect and fulfil human rights interests of individual citizens. Failure to act, delay or to take precautions by authorities does, to some extent, contribute to the predicament of long-term unemployment among resettled refugees. In cases involving human rights violations, authorities can be asked whether they knew the real or the immediate risk, and whether the steps taken were reasonable or

¹¹⁶⁴ G Neuman *ibid* 1899.

¹¹⁶⁵ Art 2(1)

¹¹⁶⁶ Art 6

the action taken was the most appropriate.¹¹⁶⁷ Failure to honour a human rights obligation can result into a duty. Axiomatically, the Nordic States are duty-bearers since ‘measuring and monitoring the state of economic, social, and cultural rights in a country is a question of accountability of duty bearers towards rights holders’.¹¹⁶⁸ As duty-bearers therefore, the concerned States have positive duties to prevent and truncate the adverse effects of discrimination, prejudice and stereotypes that partly contribute, or greatly complicates the crafting of remedies to the Gap. Unlike under ‘soft’ obligations, for instance, where States can aspire to or promote human rights objectives, discrimination and the right to substantive equality are ‘hard’ obligations demanding that systems of enforcement are actual. ‘Special measures’ can, for example, be taken to tackle the disadvantages that refugees suffer in accessing lasting and meaningful employment.

Special measures

Special measures operate under different names but they may include ‘affirmative measures’, ‘affirmative action’ or ‘positive action’.¹¹⁶⁹ Special measures can supplement national ‘laws’, ‘policies’, and ‘practices’¹¹⁷⁰ which protect the enjoyment, on an equal footing, of human rights and fundamental freedoms “in the political, economic, social, cultural or any other field of public life”.¹¹⁷¹ The special measures, if designed on a temporary basis, may target ‘disadvantaged groups’ so that they too secure and achieve ‘full and equal enjoyment of human

¹¹⁶⁷ Jason NE Varuhas, *Damages and Human Rights* (Hart Publishing, 2016) 98.

¹¹⁶⁸ UNGA, *Question of the Realization in all Countries of Economic, Social and Cultural Rights* (Report of the Secretary-General, 27 January 2016, A/HRC/31/31) para 5.

¹¹⁶⁹ CERD, *General Comment Number 32* (The meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination, 24 September 2009, CERD/C/GC/32) para 12.

¹¹⁷⁰ CERD, *General Comment Number 32* *ibid* para 11

¹¹⁷¹ *Ibid* para 9.

rights...’.¹¹⁷² Given the extent and the complexity of the Gap, resettlement refugees can qualify as a special group in need of special measures.¹¹⁷³

Special measures can be vindictory, ‘where compensatory damages are insufficient to “vindicate” the right’ violated, they mark the sense of public outrage at the violation, may deter future violations of a similar right, etc.¹¹⁷⁴ They may be awarded following mental distress a right’s claimant endures, or compensate a claimant’s feelings of loss of dignity and pride. But as usual, a claimant may be tasked with establishing a clear link between the violation and the damage suffered or the motive of the violator i.e. whether there was malice aforethought, arrogance, malevolence, insolence, or spite, etc.¹¹⁷⁵ The motives and the conduct of the defendant may aggravate the violation, but establishing the defendant’s maliciousness is very difficult work.¹¹⁷⁶

Special damages are not punitive in nature. They may follow common sense. For example, looking for work for over a decade in countries where the overall unemployment is so low, and where resources available to the State are not scarce, can qualify refugees to damages.

The list of “measures” is non-exhaustive but it may ‘include the full span of legislative, executive, administrative, budgetary and regulatory instruments, at every level in the State apparatus as well as plans, policies, programmes and preferential regimes in areas such as employment...’¹¹⁷⁷ The requirement to include special measures in States legal systems, ‘whether through general legislation or legislation directed to specific sectors’ or whether ‘through plans, programmes and other policy initiatives, on ‘national, regional or local levels’ aims at fulfilling human rights obligations States assume when they sign and ratify human rights instruments, like covenants, conventions, etc.¹¹⁷⁸

¹¹⁷² CERD, *General Comment Number 32* *ibid* para 11.

¹¹⁷³ For genesis of special measures, see UN, Economic and Social Council, *Prevention of Discrimination: the Concept and Practice of Affirmative Action* (Final report submitted by Mr. Marc Bossuyt, Special Rapporteur, in accordance with Sub-Commission resolution 1998/5, 17 June 2002, E/CN.4/Sub.2/2002/21) para 40.

¹¹⁷⁴ Jason NE Varuhas, *Damages and Human Rights* (Hart Publishing 2016) 125.

¹¹⁷⁵ *Ibid* 73.

¹¹⁷⁶ Jason NE Varuhas, *ibid*.

¹¹⁷⁷ CERD, *General Comment Number 32*, para 13.

¹¹⁷⁸ *Ibid*.

Affirmative action is a form of special measures that is frequently used but nonetheless lacks uniform meaning.¹¹⁷⁹ Legally, it is a difficult concept to define whether in international or national legal systems.¹¹⁸⁰ As a form of corrective remedy, its objective is to obtain ‘effective equality’ of ‘members of target group in one or several aspects of life’.¹¹⁸¹ The justification lies in past or current position in which such a group or groups were or are entangled in. The overall position of such a group must be deemed low or unacceptable by the national as well as international human rights standards. The list of individuals to target is open-ended but ‘innate and inalienable characteristics’, for example, ‘gender, colour of skin, nationality’, etc. can be decisive.¹¹⁸² The disadvantages suffered should be the basis to craft positive measures since past or current disadvantages can have serious repercussions in future. Poor education and training in past can contribute to underprivileged positions of descendants of the concerned groups.¹¹⁸³

Framework for registration

One example of a positive duty is the adoption of legislative framework. The group which is ‘sufficiently disadvantaged’ to merit positive measures can be difficult to identify and can even ‘induce much disagreement’, but ‘national legislation’ is better suited in most cases.¹¹⁸⁴ Authorities have time, resources, and other institutional competences.¹¹⁸⁵ They also have the ‘benefit of hindsight, ability to monitor unfolding events, and commission studies on actual impact’¹¹⁸⁶ of say, the Gap. In the beginning, affirmative action programmes in the United States

¹¹⁷⁹ UN, Economic and Social Council, *Prevention of Discrimination: the Concept and Practice of Affirmative Action* (Final report submitted by Mr. Marc Bossuyt, Special Rapporteur, in accordance with Sub-Commission resolution 1998/5, 17 June 2002, E/CN.4/Sub.2/2002/21) para 5.

¹¹⁸⁰ Ibid para 6.

¹¹⁸¹ Ibid.

¹¹⁸² Ibid para 8.

¹¹⁸³ Ibid para 17.

¹¹⁸⁴ UN, Economic and Social Council, *Prevention of Discrimination: the Concept and Practice of Affirmative Action* (Final report submitted by Mr. Marc Bossuyt, Special Rapporteur, in accordance with Sub-Commission resolution 1998/5, 17 June 2002, E/CN.4/Sub.2/2002/21) para 9.

¹¹⁸⁵ Jason NE Varuhas, *Damages and Human Rights* (Hart Publishing 2016) 398.

¹¹⁸⁶ Ibid 290.

of America targeted victims of involuntary migrants (former slaves) but the programmes were later extended to all groups whose human rights situation needed redress.¹¹⁸⁷

Affirmative action can be targeted at any group, at any time, if there is inequality sufficient enough to justify redress or preferential treatment. To avoid the controversies resulting from ‘two-class theory’, i.e., the creation of another “disadvantaged” or “discriminated against” groups, the determining factors can for example be, in case of the Gap, the number of years a refugee has spent in the Nordics, the level of education and other competences accumulated after arrival, etc. Compounding factors can be discrimination because of country of origin, religion, colour of skin, etc. but measures against unjustified discrimination are not lacking. Apart from refugees under the Gap, children of refugees can also qualify for affirmative action if there are sufficient grounds to believe that society’s past maladjustments can causally be linked to the inequalities they suffer as adults.

In any case, no national (without an immigrant background) suffering from long-term unemployment can claim to be included in the special measures. Lack of employment among nationals can directly be attributed to factors like poor business cycle, mismatch of skills, poor or inadequate education, etc., *but* not the ethnic origin, colour of skin or lack of fluence of local language. Nationals without an immigration background can find it extremely hard to claim that their long-term unemployment is aggravated by lack of proficiency of the local language (since the local language is assumed to be their mother-tongue) or the country of origin. As evinced in Denmark, Norway, and Sweden, originating from a poor and developing country contributes greatly to an immigrants’ long-term unemployment and poor integration.¹¹⁸⁸

Private parties and government employees, in addition, can be educated, regulated, and conditioned in their operations as a way of protecting human rights.¹¹⁸⁹ Legislative regulations can come in the form of sanctions for the purposes of ‘appropriate deterrence effect’.¹¹⁹⁰

¹¹⁸⁷ UN, Economic and Social Council, *Prevention of Discrimination: the Concept and Practice of Affirmative Action* (Final report submitted by Mr. Marc Bossuyt, Special Rapporteur, in accordance with Sub-Commission resolution 1998/5, 17 June 2002, E/CN.4/Sub.2/2002/21) para10.

¹¹⁸⁸ P Bevelander, HB Rasmus, I Dahlstedt, M Eskelund, LH Møller, M Macura, KP Gehrke and L Østby, *Scandinavia’s Population Groups Originating from Developing Countries: Change and Integration* (TemaNord 2013:561 Nordic Council of Ministers 2013) 29.

¹¹⁸⁹ D Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (Routledge 2012) 107.

¹¹⁹⁰ Ibid.

Administrative framework specifically aimed at minimizing the effects of the Gap can be pursued.

In the Nordics, authorities or private actors rarely directly violate human rights. The reason is that breach of a right, like through direct discrimination, is prohibited and if proved, it can be followed by legal sanctions. Paradoxically, the factors that keep the Gap in perpetuity can partially be traced to discrimination. What if authorities which are meant to provide social and economic security services to the unemployed so that they transit into activity and employment, deliberately offer skewed and narrower services; for example, courses, internships, supervision etc., to refugees than others, for example European immigrants?¹¹⁹¹ In Member States of the EU, it is against the law for any person to be treated differently in employment and training, notwithstanding, *inter alia*, ethnic origin, religion or belief.¹¹⁹²

Another question which emerges is whether the Gap could result in part from local authorities' fears of associating themselves with persons with a protected characteristic. If this is the case, the conclusion from the *Thlimmenos* case,¹¹⁹³ provides an insight. Article 14 (non-discrimination) of the ECHR, is violated when:

‘... States treat differently persons in analogous situations without providing an objective and reasonable justification... The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without objective and reasonable justification fail to treat differently persons whose situations are significantly different.’¹¹⁹⁴

Treating refugees analogously with all job seekers, including nationals without a refugee background, cannot be of much help mitigating the Gap. No group can be the appropriate comparator to refugees. Again, if local authorities justify their failure to attenuate the Gap by claiming, for example, a lack of appropriate courses for refugees who lack fluency in the local language or work overload, the practice cannot be ‘neutral’ because it disproportionately creates a disadvantage for the refugees transiting into the labour market.

¹¹⁹¹ AB Djuve and KR Tronstad, Fafo report 2011:07; ‘*Fafo-Rapport: Dårligere tilbud for ikke-vestlige*’, VG (27 April 2011) (FAFO Report: Poorer Offers for Non-Europeans) < www.vg.no/nyheter/innenriks/fafo-rapport-daarlignere-tilbud-for-ikke-vestlige/a/10084864/ > accessed 16 January 2016.

¹¹⁹² European Union, *Council Directive 2000/78/EC* (Framework Equality Directive); *Council Directive 2000/43/EC* (Racial Equality Directive).

¹¹⁹³ *Thlimmenos v. Greece*, Application Number 34369/97 (ECtHR 6 April 2000) para 44.

¹¹⁹⁴ Para 44.

5.5 Recommendation

5.5.1 Direct compensation from authorities

Since the Gap is partly perpetuated by stereotyping, prejudice and other practices of discrimination on the grounds of ethnicity and religion, and poorly managed labour-market orientated programmes, etc., it can be argued that compensating refugees for damages of ‘injured feelings’, which seems legally unnatural (heterodoxy) but may be relevant in this context, is one of the ways of mitigating the Gap.¹¹⁹⁵ If the Gap qualifies as a human rights violation, compensation may stop or prohibit future violations i.e. authorities will act promptly by preventing or minimizing factors that cause or unnecessarily prolong the Gap. Direct compensation may be the only remedy not yet tried. Failure to compensate refugees results into a status quo i.e. they are left without any form of remedy and they are fully accountable for their vulnerabilities. Exogenous factors remain irrelevant and yet they are more complicated to deal with than endogenous ones. Generally, it has also become evident that ‘in the interests of efficient dispute resolution and fairness’, the provision of standardized measures of compensation can be vital.¹¹⁹⁶ In welfare societies as the Nordics are, an individual’s command over resources, for example, money, can determine the extent to which an individual purposely controls and directs his/her living conditions.¹¹⁹⁷ With access to resources, individuals become active beings controlling and directing their living conditions.

Compensating refugees from such physical and emotional distress (non-pecuniary losses)¹¹⁹⁸ is not pinning authorities of being indifferent to victims of the Gap or having done less to mitigate the Gap. Rather, it is a sign of solidarity and requirement to fulfil human rights obligations by State parties. The assumption is that refugees have done all what they can but cannot get out of the entanglement; and that the authorities have used all available resources maximally and perhaps efficiently but the Gap has remained tenacious and cataclysmic. Should

¹¹⁹⁵ B Hepple, *Equality: the Legal Framework* (2nd edn Hart Publishing 2014) 208.

¹¹⁹⁶ *ibid*

¹¹⁹⁷ R Erikson and H Uusitalo, *The Scandinavian Approach to Welfare Research* (Swedish Institute for Social Research 1987) 179.

¹¹⁹⁸ In simple terms, they are immaterial, ancillary or intangible costs.

refugees alone continue to bear the full consequences of the Gap? What if the whole society is allocated certain responsibilities for lost earnings, for instance?

Compensation should be directed toward the current refugees because: ‘Passage of times makes compensation difficult... Moral responsibility become diffused, damages more difficult to trace. Compensation denied at any time is more likely to be compensation denied forever’.¹¹⁹⁹ Compensating victims of the Gap needs to be further justified.

There are plenty of harmful events where compensation schemes were designed from vacuum.¹²⁰⁰ The 9/11 fund to compensate victims of terrorism for, inter alia, ‘loss of business or employment opportunities’ and other non-economic losses such as ‘physical and emotional pain’ was passed by the US Congress.¹²⁰¹ Although this compensation followed a terrorist attack, it was nonetheless ‘a discrete event that caused indisputable harm to affected individuals’.¹²⁰² It can be argued that the effects of long-term unemployment on refugees can be described in similar terms i.e., there is harm directly caused by the Gap. However, linking such harm to some specific or discrete causes, is a lot more problematic. A few questions can be asked, such as who shall measure the damages and how shall the level of suffering inflicted upon victims of the Gap be quantified?

At one time, for example, it was inconceivable to litigate tobacco and asbestos industries for the damages they indirectly caused to peoples’ health.¹²⁰³ One of the suspects, as usual, was causation. Linking cigarette smoking to lung cancer was for long vehemently disputed but when science provided irreversible evidence, that tobacco was carcinogenic, inter alia, courts had nothing to do but to accept to adjudicate such cases.¹²⁰⁴ Victims were compensated.

Still, as noted by McKay, national as well as regional courts like the European Court of Human Rights can award individual remedies like compensation, restitution, and rehabilitation of victims of human rights violation due to, for instance, earnings lost and future income they

¹¹⁹⁹ DA Farber, ‘Basic Compensation for Victims of Climate Change’ (2007) 155 (6) *University of Pennsylvania Law Review* 1605, 1634.

¹²⁰⁰ DA Farber, *ibid* 1616.

¹²⁰¹ *Ibid* 1617

¹²⁰² *Ibid*

¹²⁰³ DA Farber *ibid*.

¹²⁰⁴ *Ibid*.

would receive if they were employed.¹²⁰⁵ Other damages can be consequential, for example, consultation fees paid every time a patient visits the doctor, cost of palliative drugs, etc. due to emotion distress. In *Jensen and Rasmussen v. Denmark*,¹²⁰⁶ Article 11 (freedom of association) of the European Convention on Human Rights had been violated. In both cases, as ‘victims’ whose rights had been violated by one of the High Contracting Parties of the Convention rights under Article 34, ‘compensation for both pecuniary and non-pecuniary losses may be required to ensure effective redress’, so reasoned the Court.¹²⁰⁷

Before direct compensation can be effected, several questions may need extra clarifications. For instance, quantum, pragmatic political concerns i.e. the floodgates arguments,¹²⁰⁸ chilling effects,¹²⁰⁹ administrative disruptions, propagation of litigation culture, moral status of the refugees, etc.¹²¹⁰ Are there ‘good reasons’ to award refugees monetary compensation because of maladministration by, say, the local authorities?¹²¹¹ Are the social benefits refugees receive while under the Gap not ‘modest’ enough?¹²¹² Arguments such as: public resources are scarce, different sectors like health, education, defence, etc., compete for the same limited available resources, compensating refugees may deplete national coffers, refugees under the Gap may not benefit from such status or their moral status may be doubtful (because of the mixed motives argument), etc., create strong arguments against direct monetary compensation.¹²¹³

However, human rights are indivisible and interrelated. Article 13 of the European Convention on Human Rights requires that compensation be available and is the least remedy

¹²⁰⁵ F McKay, ‘What Outcomes for Victims?’ in Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 921, 934.

¹²⁰⁶ Application Number 52620/99 (ECtHR First Section) (20 March 2003).

¹²⁰⁷ Jason NE Varuhas, *Damages and Human Rights* (Hart Publishing 2016) 331.

¹²⁰⁸ Ibid 390.

¹²⁰⁹ Jason NE Varuhas, *ibid* 382.

¹²¹⁰ Ibid 324.

¹²¹¹ Ibid.

¹²¹² Ibid.

¹²¹³ Ibid.

States may have among other positive remedial duties.¹²¹⁴ ‘Compensation’¹²¹⁵ means “compensation for the damage suffered”¹²¹⁶ and “compensation for the non-pecuniary damage flowing from the breach should in principle be part of the range of available remedies”.¹²¹⁷ Compensation for loss suffered is sometimes avoided because of pragmatic political concerns. Still, it can be argued that refugees should not benefit from their status, compensation should not constitute profit (or ‘windfall’), compensation can erode confidence in the administration of justice, etc.¹²¹⁸

Compensation should, on the other hand, aim at restoration of the refugees’ original position. Civil society must be educated on the importance of such compensation, the sensational media should not erroneously compare such compensation to a ‘windfall’, and compensation should not be avoided altogether because it will result in certain [negative] ‘impression’.¹²¹⁹ Public opinion is not a valid ground not to remedy human rights violation. If that was the case, ‘tolerance and broadmindedness’, the ‘hallmarks of democratic societies’, would be eroded.¹²²⁰ Furthermore, the fear of the sensational media may not always be there.¹²²¹ Again, it is the institution that offers the damage that should be tasked with the merits and demerits of the decision, and not public opinion and the sensational media which may have scanty background knowledge of the issue, or which lacks the understanding and complexity of the conundrum, like the Gap. The media is at the forefront in reporting the dire situation of endemic poverty in the Nordics. Therefore, it may be uncalled for speculation to assume that the Nordics’ media will write sensational articles on any remedy aimed at rescuing refugees from the Gap.

And, there is a strong need to protect ‘unpopular’ and ‘vulnerable’ minorities because they are often ‘marginalized in the society and in the political process’.¹²²² They rely more on the State

¹²¹⁴ Jason NE Varuhas, *Damages and Human Rights* (Hart Publishing 2016) 331.

¹²¹⁵ Ibid 331

¹²¹⁶ *Z v UK* (2002) 34 EHRR 3, 111

¹²¹⁷ Ibid 109; *Keenan v UK* (2001) 33 EHRR 38, 129; *Reynolds v UK* (2002) 55 EHRR 35, 67.

¹²¹⁸ Jason NE Varuhas, *Damages and Human Rights* (Hart Publishing 2016) 380.

¹²¹⁹ Ibid.

¹²²⁰ Jason NE Varuhas ibid 381.

¹²²¹ Ibid.

¹²²² Jason NE Varuhas, *Damages and Human Rights* (Hart Publishing 2016) 381

than on their sinews and wits. The Nordics labour market has, for instance, miserably failed to integrate nearly half of the refugees originating from poor and developing countries. What refugees miss out most are employment opportunities and the benefits accruing from provision of their labour. Monetary compensation for such loss is a justification. The debate whether authorities should design positive measures, for example damages, to directly put back refugees in a position they would have been in if they were working, continues to rage on.

It has also been observed that there are risks in replicating ‘the dangers of “defensive medicines” by creating dangers of “preventive administration” through human rights damages’.¹²²³ Courts are for instance forewarned to be aware of the ‘chilling effects’ of the liabilities on the administrative decision-making.¹²²⁴ Public officials are thus advised to take care of the public interest by acting promptly, decisively and with less self-regard or calculations and ‘to accomplish the public business in socially efficient, cost-minimizing ways’.¹²²⁵ But, such assumptions may be flawed as they are grounded in ‘an empirical void’, are based on ‘untested speculation and intuition’ which ‘provides “an unreliable basis for deciding what to do”’.¹²²⁶ One judge may for instance claim that ‘liability will result into negative impacts’ while another, in the same case, will claim that such compensation will result into ‘positive or no effects...’¹²²⁷ Therefore, decisions affecting basic human rights should not be based on ‘hunches’, ‘speculation’, ‘intuition’, and ‘unproved’ and ‘unprovable’ propositions.¹²²⁸ Because such practices are not evidence-based, they may result into lack of transparency and other untested legal assumptions.¹²²⁹

¹²²³ H Woolf, ‘The Human Rights Act 1998 and Remedies’ cited in Jason NE Varuhas, *Damages and HumanRights* (Hart Publishing 2016) 382.

¹²²⁴ See several examples in Jason NE Varuhas, *Damages and HumanRights* (Hart Publishing 2016) 382.

¹²²⁵ P Schuck, ‘Suing Government: Citizen Remedies for Official Wrongs’ (Yale 1982) 21 in Jason NE Varuhas, *ibid* 382.

¹²²⁶ P Cane, ‘Consequences in Judicial Reasoning’ in Horder (ed), *Oxford Essays in Jurisprudence, Fourth Series* (OUP, 2000) 42, 49 [consequences] cited in Jason NE Varuhas, *Damages and HumanRights* (Hart Publishing 2016) 382.

¹²²⁷ Jason NE Varuhas, *ibid* 381.

¹²²⁸ B Markesinis et al, ‘Tortious Liability of Statutory Bodies’ (Hart Publishing 1999) 1-2, 40, 45, 78-81 cited in Jason NE Varuhas, *Damages and HumanRights* (Hart Publishing 2016) 383.

¹²²⁹ Jason NE Varuhas, *ibid* 383.

In a country like Norway where the average monthly wages are over \$5,400, paying a refugee under the Gap a certain quantum, like two-thirds (\$3,600), will not make them super-rich.¹²³⁰ It will rather relieve them from demonstrable financial distress, the feeling of belonging to the society will be ameliorated, average consumption will increase, and may be an incentive for employers to hire them.

The last point needs further explanation. Society in general may not *tolerate* or *accept* that refugees under the Gap are paid such a quantum without participating in the production of goods and services. It will therefore be *too costly not* to employ them. Currently, given the high price of labour irrespective productivity, it costs society less to keep refugees on the means-calculated social benefits. The status quo can end if the means-tested benefits become more expensive than they currently are.

Negative public opinion propagated by the sensational media, immigrant-skeptical politicians and welfare chauvinists must be tasked with the provision of evidence of the number of nationals willing to live on the means-calculated benefits (about \$700 per month) for decades, or even for their entire lives. What complicates the matter may not be the fear of negative public opinion but the unwillingness and fear by authorities to implement such a proposal. The fear may not be there, however.

According to Varuhas, governments are not helpless: they occupy a privileged position in any society, they suffer no shortage of techniques, they can alter the rule of the game in their interest.¹²³¹ If parliament can pass legislation for welfare deductions, a punitive policy, it can, without much restriction, offer relief and other forms of positive measures. If reasonable compensation is awarded to refugees, it will dissuade the labour market not to continue to employ refugees. Monetary compensation near to national average monthly wages will reduce administrative costs, and once they catch the sensational media headlines, pressure may increase on both private and public employers to make refugees work for such an amount. One study by Epp on discriminatory practices and abuse by the British police from the 1980s concluded that increased damage litigation garnered significant media attention, caused police persistent

¹²³⁰ Average wages are dealt with in section 2.6.3.

¹²³¹ Jason NE Varuhas, *Damages and Human Rights* (Hart Publishing 2016) 399.

embarrassment, and drove significant national policies.¹²³² Generally, awarding damages [direct compensation in this case] may serve the functions of a ‘fire alarm’.¹²³³

It is argued that because of the vastness of the administrative state, detecting administrative policies and practices that violate human rights, like refugees’ right to work, can be difficult work for Parliament and its Committees, not excluding the central government.¹²³⁴ Like other damages and awards, directly compensating refugees for lost earnings can be ‘blunt and imperfect tool’¹²³⁵ but it ‘can pinpoint areas of administration where something has gone seriously awry’.¹²³⁶ There is need to facilitate political consciousness and accountability if a human rights is violated; political forces and pressure may be mobilized, a call for external monitoring mechanisms adopted, and the political branches may call for urgent investigations if courts intervene.¹²³⁷ Good public administrative practices will become ‘fair’, ‘proportionate’ and ‘sensitive’ to refugees under the Gap.¹²³⁸ Refugees will be on an equal footing like the nationals and other European immigrants if direct compensation is triggered. Administrators may put things right, serious responsibilities may be taken further, the need for continuous improvement may arise in case refugees are directly compensated.

The greatest limitation to compensation may come from, inter alia, the authorities’ unwillingness to accept or to clarify whether the Gap is a human rights violation in need of Statutory intervention. Who and whom to assign the responsibility of the infringement can cause more hiccups. Finally, the willingness of the State to use its discretionary powers to intervene can minimize the effects of the Gap greatly. The Gap is a result of long-term unemployment. Unemployment contributes to poverty which exacerbates inequality. Therefore, intervention by the State authorities is essential if distributive justice is to be strengthened and if respect for dignity is to be observed.

¹²³² Jason NE Varuhas, *ibid* 411. See also CR Epp, *Making Rights Real* (Chicago 2007).

¹²³³ MD McCubbins and T Schwartz, ‘Congressional Oversight Overlooked: Police Patrols versus Fire Alarms’ (1984) 28 *American Journal of Political Science* 165 cited in Jason NE Varuhas, *Damages and Human Rights* (Hart Publishing 2016) 411.

¹²³⁴ Jason NE Varuhas, *ibid* 411.

¹²³⁵ AM Linden, ‘Tort Law as Ombudsman’ (1973) 51 *Canadian Bar Review* 155, 168 cited in Jason NE Varuhas, *ibid* 411.

¹²³⁶ Jason NE Varuhas *ibid* 411.

¹²³⁷ *Ibid*.

¹²³⁸ *Ibid* 414.

5.5.2 Mandatory injunctions, structural interdicts, and dialogical space

Violation of economic and social rights can be justiciable i.e. courts can resolve such matters appropriately. Again, violation of norms in the International Covenant on Economic, Social, and Cultural rights can be justiciable because some are self-executing i.e. without further elaboration, courts can apply such norms without going an extra mile in elaboration as General Comment Number 3, paragraph 5 noted.¹²³⁹ Courts can, for example, issue mandatory orders, a declaration of partial failure to act by the authorities. Through these mandatory injunctions, courts can order authorities to increase the budgets aimed at lessening the effects of the Gap, or can order the setting up of a compensation fund. Courts can issue structural interdicts or supervisory orders thereby playing a supervisory role.¹²⁴⁰ The Gap can be confirmed or declared as a violation of international human rights, making it the duty of State authorities to remedy it. Remedial programmes where civil society and others can participate in the design and implementation stages can be sought.¹²⁴¹ Dialogical space is thus created between statutory authorities, courts, and civil society actors even though such a process can be undemocratic, since courts are not democratically elected institutions.¹²⁴² Koch noted that to '[point] out that a certain matter needs a new solution is not the same as taking over the legislative role'.¹²⁴³

The hurdle can be the capacity of resettlement refugees to demonstrate that the Gap is caused in part by government failure. But as noted by Oleszkiewicz and Sanders: '... Lawsuits do not have to be successful on the merits before they cause a defendant to spend significant time and resources'.¹²⁴⁴ This research does not intend to delve into the success or failure of these

¹²³⁹ P O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences*, (Routledge 2012) 37-8.

¹²⁴⁰ S Stratum, 'A Normative Theory of Public Law Remedies' (1991) 79 *Georgetown Law Journal* 1355 cited in P O'Connell, *ibid*, 195.

¹²⁴¹ G Budlender, 'The Role of the Courts in Achieving the Transformative Potential of Socio-Economic Rights' (2007) 8 (1) *ESR Review* 9, 10 in P O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2012) 195.

¹²⁴² G Budlender in P O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2012) 196.

¹²⁴³ IE Koch, 'The Justiciability of Individual Human Rights' (2003) 2 *Nordic Journal of International Law* 3, 36 in P O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2012).

¹²⁴⁴ VS Oleszkiewicz and DB Sanders, 'Advent of Climate Change Litigation Against Corporate Defendants' (2004) 27 *International Environment Reporter* 937 in DA Farber, 'Basic Compensation for Victims of Climate Change' (2007) 155 (6) *University of Pennsylvania Law Review* 1605, 1616.

schemes, but they have existed. However, lack of and ‘absence of evidence’¹²⁴⁵ should not prevent courts to assume that suffering does occur since ‘violation of human rights disrupts the ‘life plan’ of a person.’¹²⁴⁶

Still, even if evidence in form of causation is hard to come by, looking for a job for more than a decade is frustrating and emotionally destructive. Lack of evidence should also not prevent demands for compensation, as the suffering and damage caused by the Gap are self-evident and indisputable, given the existence and persistence of poverty among refugees in the Nordics. Ways to deal with the lack of causal evidence could include lowering evidentiary standards; relying more on presumptions, sample statistics, valuations and verifications which have been standardized; and reversing the burden of proof.¹²⁴⁷ Denying such evidence would be like denying the existence of sand in Sahara Desert while at the same time strongly believing that rain i.e. relief is coming the next day.

5.5.3 Administrative measure

To mitigate it the Gap, administrative remedies that are consistent with, for example, equality and/or non-discrimination provisions, can be effective.¹²⁴⁸ If justice is to be delivered to refugees entrapped by the Gap, individual remedies, for example, measures of satisfaction, measures of non-repetition, or measures of procedural justice may be required.¹²⁴⁹ Specific individuals can be targeted using specific criteria through a national system of compensation. Such criteria would include, but are not limited to, the number of years a resettlement refugee has spent under the Gap; successful completion of a local language programme and other forms of education; workplace experience and the number of jobs applied for, etc. Such criteria would

¹²⁴⁵ F McKay, ‘What Outcomes for Victims?’ in D Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP, 2013) 935.

¹²⁴⁶ A Carillo, ‘Justice in Context: The Relevance of Inter-American Human Rights Law and Practice to Repairing the Past’ in P de Greiff (ed), *The Handbook of Reparations* (OUP 2006).

¹²⁴⁷ F McKay ‘What Outcomes for Victims?’ in D Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP, 2013) 944.

¹²⁴⁸ JM Woods, ‘Emerging Paradigms of Protection for “Second-Generation” Human Rights’ (2005) 6 *Loyola Journal of Public Interest Law* 103 in P O’Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2012) 179.

¹²⁴⁹ F McKay, ‘What Outcomes for Victims?’ in Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 921, 931.

be enough to show that even in the absence of evidence of obvious causes, there is *prima facie* evidence of suffering due to the Gap. Refugees under the Gap suffer palpable moral and physical damages. Individuals targeted in this way can be awarded monetary compensation for lost remuneration. The type of approach has a legitimate aim to remedy the suffering refugees go through, is necessary in a democratic society as it resonates with fairness and proportionality principles, even when implemented on a temporary basis.¹²⁵⁰

5.5.4 System change

Systematic change may also be required if future acts of omissions or commission are to be prevented. Raising awareness and reforming institutions that repeatedly fail to achieve their objectives are among the examples. Other changes may require introduction of benchmarks¹²⁵¹ to strengthen the effectiveness, transparency and accountability, for example, of policies.¹²⁵²

It all stems from the difficulties of crafting remedies for victims of, say, prejudice which exists in silence but results in harm. An employer prejudiced against resettlement refugees rarely recruits them for employment. The idea of compensation sounds novel, but there are injured feelings to repair, persistent poverty to fight off, damaged health to treat and delayed integration to re-accelerate if victims of the Gap are to make full use of their potential, *ceteris paribus*. The Nordic governments can be negligent, for example when they fail to tackle indirect discrimination in job recruitment especially by private employers; or when they fail to monitor whether programmes designed to help refugees enter the labour market through apprenticeships are achieving their initially intended aims and objectives.

In general, the greatest challenges would include the unwillingness of politicians (ie lack of political general will and the overall economic and social situation) to allow the initiation of action; lack of interest by courts; costs; and the tensions that could arise from nationals already biased against refugees and other immigrants in general. Legally, compensation for a loss such as

¹²⁵⁰ CERD, *General Comment Number 32*, para 16.

¹²⁵¹ United Nations, *Human Rights Instruments, Volume 1* (Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, 27 May 2008, HRI/GEN/1/Rev.9 (Vol 1) para 6, 3.

¹²⁵² United Nations, Economic and Social Council, *Report of the United Nations High Commissioner for Human Rights* (26 April 2011, E/2011/90).

an economic loss is usually directed towards the physical harm suffered. Crafting remedies for social and economic rights is, however, hard work just as observed by Roach.¹²⁵³

5.5.5 Anti-discrimination approach - Affirmative action

Mitigating the effects of the Gap may require new laws whose objective would be to ensure greater inclusion of refugees in accessing employment opportunities. Although the term ‘affirmative action’ was first used in the USA,¹²⁵⁴ in Title VII of the Civil Rights Act of 1964, there is no reason why it cannot be applied to the Gap. If judges and members of the executive, for example, the prime minister, are given extra powers and obligations to remedy the unjustified discrimination that partly leads to under-representation of refugees in employment, then substantive equality, diversity, proportionate representation in the workplace can be achieved.¹²⁵⁵ The Norwegian Ethnicity Anti-Discrimination Act¹²⁵⁶ challenges public authorities to make active, targeted and systematic efforts to promote equality irrespective of ethnicity, religion or belief.¹²⁵⁷ What those efforts are, without any concrete examples, can be interpreted as ambiguous.

On the other hand, a Finnish employer who employs at least 30 persons regularly is required to have a plan for the promotion of equality.¹²⁵⁸ But again, the measures and their effectiveness, as a rule, are discussed only with the personnel or their representatives.¹²⁵⁹ In such circumstances, it is questionable whether such personnel will hire refugees just for the purpose of promoting equality. In general, introduction of affirmative action measures can: remedy or redress historical injustices,¹²⁶⁰ remedy social/structural discrimination,¹²⁶¹ create diversity or

¹²⁵³ K Roach ‘The Challenges of Crafting Remedies for Violations of Social-economic Rights’ in M Langford, ed., *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008) 46-58, 46.

¹²⁵⁴ B Hepple *Equality: the Legal Framework* (2nd edn Hart Publishing 2014) 26.

¹²⁵⁵ B Hepple *ibid.*

¹²⁵⁶ Chapter 3

¹²⁵⁷ S13

¹²⁵⁸ *Non-discrimination Act (1325/2014)* s7 (2).

¹²⁵⁹ *Non-discrimination Act (1325/2014)*; *The Swedish Discrimination Act 2008:567* chap 3 s1.

¹²⁶⁰ UN, Economic and Social Council, *Prevention of Discrimination: the Concept and Practice of Affirmative Action* (Final report submitted by Mr. Marc Bossuyt, Special Rapporteur, in accordance with Sub-Commission resolution 1998/5, 17 June 2002, E/CN.4/Sub.2/2002/21) para 17 and 18.

¹²⁶¹ *Ibid* para 19

proportional group representation,¹²⁶² increase the well-being of many people in different ways,¹²⁶³ pre-empt social unrest,¹²⁶⁴ better efficiency of socio-economic system.¹²⁶⁵ Affirmative action is also a means of nation building.¹²⁶⁶

6.5.6 Positive action

One of the ways to redress the Gap's effects would be for States Parties to the International Covenant on Economic, Social and Cultural Rights to adopt legitimate, proportional, objectively and reasonably justified positive measures aimed at achieving sustainable and substantive redress for the *de facto* discrimination, even when such measures are exceptional but permanent.¹²⁶⁷ Positive measures, on the other hand, are grounded in Directive 2000/43/EC.¹²⁶⁸ Accordingly, a Member State is free to maintain or adopt special measures aimed at preventing and or compensating persons who have suffered detriments because of their racial or ethnic origin. Positive action is also mentioned in Directive 2004/113/EC.¹²⁶⁹ To have equality between men and women, the equal treatment principle requires Member States to maintain or adopt specific measures to 'prevent or compensate for disadvantages linked to sex'.¹²⁷⁰ In other words, if discrimination is on the grounds of sex, a refugee can lodge a case accordingly.

It can, however, also be argued that such directives, and indeed other internationally ratified treaties, never mention refugees as a special group like women, children, the elderly, or persons with disabilities in need of special measures based on the principle of accommodation.

¹²⁶² Ibid para 20-21.

¹²⁶³ Ibid para 22-25.

¹²⁶⁴ Ibid para 26-27.

¹²⁶⁵ Ibid para 28.

¹²⁶⁶ UN, Economic and Social Council, *Prevention of Discrimination: The Concept and Practice of Affirmative Action* (Final report submitted by Mr. Marc Bossuyt, Special Rapporteur, in accordance with Sub-Commission resolution 1998/5, 17 June 2002, E/CN.4/Sub.2/2002/21) para 29.

¹²⁶⁷ CESCR, *General Comment Number 20* para 9.

¹²⁶⁸ European Union, *Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin* OJ L 180, 19 July 2000 art 5.

¹²⁶⁹ European Union, *Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services* art 6.

¹²⁷⁰ Directive 2006/54/EC, preamble para 22.

The requirement for the immediate redress of *de facto* discrimination binds all European Union Member States. Most refugees are ethnically different, and their religions are mostly different, but they are *bona fide* nationals whose stay is *de jure*. Discrimination is discrimination regardless of the ‘motive’ (*‘bona fides or mala fides’*), but the ‘result or effect’ is very important.¹²⁷¹

Refugees, as a matter of urgency, have a right to demand protection from the Gap through positive action or measures. For McCrudden,¹²⁷² five types of positive action can improve the situation by:

1) eradicating practices that have the effect of disadvantaging a particular group, such as word-of-mouth hiring;

2) applying policies that seek to increase the proportion of members of a previously excluded or under-represented group;

3) adopting outreach programmes designed to attract candidates from under-represented groups;

4) introducing measures which amount to preferential treatment or ‘reverse’ discrimination in favour of a particular group and;

5) attempting to redefine ‘merit’ by altering the qualifications necessary for a job so as to encourage recruitment or promotion of members of a disadvantaged group, for example, by permitting ‘genuine occupational qualifications’ which might favour a particular group.

Another measure State authorities can seek to implement is a quota system in labour force recruitment, just as when they politically decide on a specific quota of refugees to resettle.

5.5.7 Mandatory targets (quotas)

Quotas involve policies that aim to raise the position of a disadvantaged group. Many positions can be reserved for refugees using objective criteria justifying such an action. The aim is to achieve a legitimate objective if elements of proportionality are put into consideration. Giving priority in recruitment and promotion to persons with protected characteristics, while verifying that such persons do not suffer a detriment or under-representation, could satisfy the

¹²⁷¹ *South-West Africa Cases (Second Phase)* (1966) ICJ Reports 6 Dissenting Opinion of Judge Tanaka 302.

¹²⁷² C McCrudden, ‘Rethinking Positive Action’ (1986) 15 *Industrial Law Journal* 219, 223-5; B Hepple *Equality: The Legal Framework* (2nd edn Hart Publishing 2014) 26-7.

mandatory targets. But as observed, the candidates must be ‘as qualified as’ each other.¹²⁷³ Both public and private sector recruiters should see themselves as having an equal duty to promote equality.

5.6 Conclusion

The Gap is quite complex but it is real, and not imaginary. The victims are there. However, to whom to assign the responsibility can be more challenging than looking for a needle in a haystack. Refugees themselves are exposed to many challenges. These can include lack of fluency in the local language; a lack of education and experience of work with equivalent value to that of nationals; non-recognition of refugees’ previous experience and education; complicated labour force recruiting methods; and the trauma suffered by many refugees before and immediately after resettlement, etc.

Internationally accepted human rights obligations to respect, protect and fulfil are not given much emphasis in this context. The authorities, however, have good programmes that prepare refugees to meet the new challenges. The introduction programme, where resettled refugees spend the first two to five years learning the local language and culture, is a good example. In Norway, the hours can be extended to 2,400 (eight years) depending on an individual’s capacity. Some refugees, for example, start by learning the Latin alphabet. After the language programme, some go for higher education; others participate in short-term, labour-market orientated courses. Many more participate in apprenticeships. After a decade, however, less than 50 per cent will be actively employed. Many who complete higher education end up becoming “academic derelicts” when nobody employs them. Even those in active labour will often have fixed-term contracts, or will be on call, while others work one hour a week. This raises the question: If refugees do everything they are told to do, but after a decade, many remain unemployed, who else should partly shoulder the blame?

The policies designed by the authorities might be full of *lacunae*. The quality of policy implementers can be an issue of concern, variously accused of offering differentiated services, preferring certain ethnic groups to others, or gather more statistics than preparing refugees for jobs: any refugee who has been through the job-seeking process will describe similar

¹²⁷³ B Hepple, *Equality: The Legal Framework* (2nd edn Hart Publishing 2014)159.

experiences. Participants are taught over months how to write CVs and search for jobs on the internet, and yet they know that most entry-level jobs are offered through word-of-mouth. Other refugees work through employment agencies, mostly for short periods when a permanent employee is either sick, on holiday, or over-burdened with work. In other incidents, employers are in the process of transition, for example, during mergers or acquisitions. Extra labour is often required due to the uncertainties of the process. When refugees go for apprenticeships, they are taught only a small part of the work. If it is administrative work, they may be taught to use a few keys on a computer, like ‘copy and paste’. At the end of the period, they have nothing to show for the experience except a certificate which no other employer will ever look at. The situation is sufficiently confusing to be compared to an advanced jigsaw puzzle, which half of the refugees never manage to assemble. Thus many stay grappling with the Gap for years.

This situation calls for solutions, which may be externally determined. The role of courts and administrative measures to address the Gap should not be undermined. Adopting positive measures aimed at reversing the consequences of the Gap, even when resistance from the wider public is anticipated, is called for. In democratic societies, there are many issues that divide the public. For instance, admission of refugees is vehemently resisted but when common sense prevails, adjustments come in. Long-term unemployment means that refugees lose their dignity; equality of opportunity is a mirage; access to property is an illusion; the right to work remains a hallucination; and the health of the refugees dissipates. States’ obligations of conduct and result are never realized. In such a situation, many refugees never benefit from the aspirations in the Universal Declaration of Human Rights and other internationally acclaimed human rights instruments. National anti-discrimination laws are useful especially in fighting direct discrimination, but more are inclined to the protection of women, children and people with disabilities, and not refugees *per se*.

The issue whether the Gap is justiciable or whether it is a violation of self-executing norms has also been addressed. Quite convincingly, courts can address the Gap. They cannot just call upon issues of capacity, or invoke separation of powers doctrine because the duty to protect human rights is self-evident and belongs to all ie the courts, executive, legislature, local administrators and even private individuals. The measures courts can take have also been discussed quite convincingly. Whether victims of the Gap are directly compensated or whether courts can intervene by challenging the executive to take concrete measures to diminish the Gap,

the role of courts cannot be given less weight. Because the Gap is partly complicated by acts of discrimination, it makes sense to apply methods based on philosophies of positive action or other affirmative approaches which lessen the effects of discrimination.

The ultimate solution will come from the executive that has control over the national budget. With political will, a compensation fund can be set up, and discrimination within the local administration can be reduced by vetting employees just as refugees are continually and continuously scrutinized. Finally, a new convention could be adopted by the United Nations to complement the 1951 Refugee Convention. How to go about this, is a challenge that will ultimately need more resources like time and other resources.

Chapter 6. Conclusions

6.1 Introduction

The cardinal aim of this chapter is to give a concise and brief but comprehensive account and analysis of the research hypothesis. The probable causes and consequences of the Gap have been examined at a minute level. Epistemologically, the degree to which the primary research question (the Refugee Gap, its intractability and the remedies) has been responded to, and the extent to which the previous gap in knowledge has been filled, are all an integral part of the chapter. The objective of the thesis is to find ways to mitigate the Gap, and it is apparent that human rights law can be useful in this endeavour or goal.

The thesis first delved into the whys and wherefores of the existence, persistence and perpetuation of the Gap on a contextual basis. Comparisons between the Nordics and countries like the United States of America, Canada and Australia, which resettle substantial number of refugees, revealed stark differences, especially in the long-term.

Further, once the causes had been revealed with a fair degree of certitude, the thesis swiftly moved forward to discuss the impact and consequences of the Gap: for example, persistent poverty that results in over-dependence on welfare benefits. For instance, ‘Immigrants from Afghanistan, Iraq and Somalia receive roughly twice as much in (equivalence-scaled) benefits than natives’ and, ‘despite an increase in earnings over time in Finland, benefits tend to remain quite constant’.¹²⁷⁴ Free benefits create stigma for the recipients, and uneasiness among nationals and the authorities who question whether the whole system is sustainable. The problem seems to lie in isolating the causes from the effects, which in turn complicates the crafting of solutions in the form of remedies for the Gap. Differentiating short-term from long-term causes, or endogenous from exogenous factors, causes its own concerns.

Furthermore, the thesis statement is answered when remedies to the Gap are proposed. Lastly, the future of the Gap is discussed considering its capacity to produce new knowledge for academia, policy makers, policy implementers and other stakeholders. National debates and

¹²⁷⁴ M. Sarvimäki, ‘Labour Market Integration of Refugee in Finland’ in B. Bratsberg et al., *Nordic Economic Review: Labour Market Integration in the Nordic Countries* (TemaNord 2017:520, Nordic Council of Ministers 2017) 91-114, 92.

policies will have to shift in order to respect and commit to concepts derived from international human rights law if the Gap is to be mitigated.

6.2 The intractable Gap

The Gap is intractable because it touches the nerve of social policy geared towards refugees as a category of migrants. Before this thesis, study of the Gap had attracted the attention of sociologists, political scientists, policy makers, etc. They used various methods, but qualitative and quantitative dominated the field. Accordingly, the endogenous factors, for example the lack of local language proficiency, inconvertibility of skills, lack of relevant education, and poor levels of new skills and training, etc. have been postulated and confirmed. However, the often-suggested solutions are less successful in mitigating the Gap. The Gap remains recalcitrant under the protective trade union policies, and the apparently ideological battles between labour and capital. This recalcitrance is further succoured by practices of discrimination because of, *inter alia*, religion, ethnicity (race); not excluding prejudices and stereotypes that add an extra layer of complexity. However, as a matter of urgency, solutions should be found if refugees are to be included in society. Participation in gainful employment is the greatest measure of the extent to which refugees' right to work should be respected. Without opportunities and access to secure employment, living wages, self-employment or promotion¹²⁷⁵ once a job is secured, the Gap cannot be escaped. But because the Gap is still impossible to satisfactorily manage, other approaches were sought by the thesis.

International human rights law that demands positive action is the second-best alternative that can mitigate the Gap. If nearly half of refugees do not obtain their living by provision of their labour in the long-term, even after acquiring the specific competencies required in the Nordics, and if the authorities cannot design policies that directly target refugees for employment opportunities, then States' duty and obligation to respect, protect, fulfil and promote human rights can never be realized. As noted by Shue, States have duties to avoid deprivation, protect from deprivation and aid the deprived, since deprivation of a right occurs accidentally (unpredictably) or systematically (inherently or predictably).¹²⁷⁶ However, the elusiveness of the

¹²⁷⁵ ICESCR art 7(c).

¹²⁷⁶ H Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* (1996) 47, 52.

panacea cannot be put down to a paucity of international human rights law principles or norms (which qualitative and quantitative researchers seem not to employ), but rather to non-commitment to their observance. Concluding, for example, that it is impossible to differentiate refugees from ordinary migrants because they share an original motive to migrate might lead to a situation similar to ‘*vacatio legis*’ or ‘absence of law’; however, the Refugee Convention, national laws and institutions that monitor and manage refugee issues are not lacking in this regard. International customary law is clear as to who refugees are and how they should be treated. In general, violations of human rights occur when a State fails to act (omission), for example, ‘failure to regulate activities of individuals or groups to prevent them from violating...rights’, and ‘the failure to utilise the maximum available resources towards the full realization of the Covenant’ (ICESCR).¹²⁷⁷ However, violations can be rectified by provision of remedies.¹²⁷⁸

6.2.1 Tackling endogenous factors - the ‘normal’ old approach

In the short-term, the literature review¹²⁷⁹ revealed that the Gap was similar in all countries and across all refugee groups. Characteristically, unemployment rates are very high, wages are dismally low and the chances of upward labour mobility are almost non-existent. In the long-term, however, the Gap should significantly lessen after refugees have acquired country-specific competencies. However, studies have continued to baffle researchers because the Gap is persistent.¹²⁸⁰ Over a decade after their arrival, about half of the refugees have no access to gainful employment, while others work for less than one hour a week, mostly in a few specific sectors topped by health (nursing and care homes). The finance and insurance sectors, for example, employ statistically insignificant numbers of refugees. With the exception of the

¹²⁷⁷ For State failure through omission, see the Maastricht Guidelines para 15.

¹²⁷⁸ Maastricht Guidelines paras 22, 23.

¹²⁷⁹ E Ott, PDES/2013/16; P Connor, Explaining the Refugee Gap: Economic Outcomes of Refugees versus Other Immigrants’ (2010); KE Cortes, ‘Are Refugees Different from Economic Immigrants? Some Empirical Evidence on the Heterogeneity of Immigrants Groups in the United States’ (2004).

¹²⁸⁰ P Lundborg, ‘Refugees’ Employment Integration in Sweden: Cultural Distance and Labour Market Performance (2013) 21 (2) *Review of International Economics* 219, P Bevelander, ‘The Employment Integration of Resettled Refugees, Asylum Claimants, and Family Reunion Migrants in Sweden’ (2011) 30 (1) *Refugee Survey Quarterly*; R Koopmans, ‘Trade-Offs between Equality and Difference: Immigrant Integration, Multiculturalism and the Welfare State in Cross-National Perspective’ (2010) 36 (1) *Journal of Ethnic and Migration Studies* 1.

United States of America, where average wages remain low notwithstanding time spent there, the Nordics' experience is of the absolute lack of access to gainful employment. Despite the overall low national rates of unemployment,¹²⁸¹ refugees exhibit higher unemployment rates, exceeding 50 per cent in some groups. However, once a job is secured, wages are relatively high and equal to those of the nationals and other migrants. Could this be due to national policies protecting workers against discrimination in wages? In other words, workers with indefinite contracts have many advantages, which include respect for equal pay for equal work of equal value.

The principle of equal pay for equal work of equal value is observed by Nordic employers because it is grounded in law.¹²⁸² Managers and the authorities do implement European Union directives by, for example, transposing them into domestic laws.¹²⁸³ The European Union Member States are obliged to 'take the necessary measures to ensure that provisions appearing in collective agreements, wage agreements or individual contracts of employment which are contrary to the principle of equal pay shall be, or may be declared, null and void or may be amended'.¹²⁸⁴

Under the usual, old 'normal' approach, the authorities focus more on endogenous factors. Refugees are taught the local language, various short-term labour market-orientated courses are offered, including all the necessary country-specific competencies. Refugees are compared to young school leavers, without any work experience joining the labour market for the first time. However, the analogy is insufficient. No group can best be compared to refugees. They have additional problems related to language, age, ethnicity, religion, education and poor coping mechanisms, etc.

Refugees are nonetheless offered courses whose objectives and quality give cause for concern. The European Commission, for instance, was concerned about courses with 'insufficient learning content' where 'trainees were asked to do menial tasks', and with 'inadequate working conditions' where trainees experienced long working hours, poor coverage

¹²⁸¹ Organization for Economic Co-operation and Development (OECD), 'Labour Market Statistics: Harmonized Unemployment Rates (HURs)' < http://stats.oecd.org/BrandedView.aspx?oeed_bv_id=mei-data-en&doi=data-00046-en > accessed 30 June 2017.

¹²⁸² Treaty on the Functioning of the European Union (TFEU) art 157 (3).

¹²⁸³ EC Treaty art 141 (ex-Article 119) ; European Union, *Council Directive 76/207/EEC* art 1.

¹²⁸⁴ European Union, *Council Directive 75/11/EEC* art 4.

of health, safety or occupation risks, poor compensation, etc.¹²⁸⁵ Similar worrisome issues were also observed in Norway.¹²⁸⁶ In Sweden, most government policies targeting refugees to improve their labour market participation had relatively poor outcomes.¹²⁸⁷ Because most of those courses are inherently shallow in content or are poorly run, trainees emerge with certificates not worth the paper they are written on. Under the unwavering Gap, refugees apply for as many labour market-orientated courses as possible to appear ‘active’, otherwise their economic support can be slashed. Such courses are sometimes in short supply. The authorities choose participants where fluency in the local language is usually the main criterion. Refugees accept the offer, and follow closely what the authorities prescribe, because they must become fully competent and functioning members of society.

On paper, this is a win-win situation. Logically, it seems to be the most appropriate and prudent way to control the endogenous factors. However, notwithstanding all the effort and resources involved, the Gap does not wither. The implication is that the old approaches cannot deliver effective remedies. Approaching the Gap using laws and norms derived from international human rights reveals the weaknesses of the old approach and the cloud of uncertainties surrounding the suggested solutions. The top-down approach offered by the authorities is not, to a large extent, grounded in human rights and other legally binding principles and norms of equality and social justice. The executive, legislature and private employers do not imagine that they are under constitutional as well as international human rights obligations to dampen the effects of the Gap by respecting the right to work, for instance. ‘States Parties are accountable both to the international community and to their own people for their compliance with the obligations under the Covenant’.¹²⁸⁸ Therefore, the ‘old solutions’ can be interpreted as declarations whose success largely depend on the goodwill of the implementers. With qualms visible through public policy debates, the executive and the legislature cannot easily remove or change such policies. Only law can rescue and further resuscitate the situation.

¹²⁸⁵ European Commission, Proposal for a Council Recommendation on a Quality Framework for Traineeship, COM (2013) 857 final.

¹²⁸⁶ Institute for Labour and Welfare Research (Fafo) Report 2011:07 .

¹²⁸⁷ O Åslund, A Forslund and L Liljeberg, ‘Labour market entry of non-labour migrants – Swedish evidence’ in B Bratsberg et al., *Nordic Economic Review: Labour Market Integration in the Nordic Countries* (TemaNord 2017:520, Nordic Council of Ministers 2017) 115- 158, 143

¹²⁸⁸ Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, principle 10.

When sociologists study the Gap, for instance, and where such studies question mainly the future motives rather the causes of refugee flows, the objectives or purposes of such studies can be questioned since the subject is already covered by law.¹²⁸⁹ National, regional, and international human rights law instruments do not focus much on motives after the issuance of refugee status. This is because such status is not given without confirmation that the person concerned is in need and deserves it according to the established laws. When refugees' original motives are questioned, in addition to whether refugee movements are voluntary or involuntary, or whether such movements involve push (reactive) factors such as conflicts,¹²⁹⁰ etc. or pull (proactive) factors such as a dearth of material goods or the prospect of maximizing future material benefits, the studies override what the law has put right and appropriate. Generally, emotional, and motivational relationships are individually centered, personal, blurred and can be on a continuum. No general clear-cut distinctions and conclusions can be drawn.

6.2.2 Refugee or economic migrant? Law the final arbiter

The air of confusion surrounding the two terms 'refugee' and 'economic migrant' has been clarified using legal definitions. This thesis appealed to relevant law (domestic and international), which set out the definition of a refugee, the process of seeking refugee status, and the authorities responsible for managing the process.¹²⁹¹ Protection from further persecution due to one or all of the five grounds of race, religion, nationality, membership of a social group or holding of a political opinion, is the central motive in protecting refugees. Protection is also grounded in international customary law, where the fundamental principles of non-discrimination, non-penalization and *non-refoulement* should be observed.¹²⁹² The requirement to

¹²⁸⁹ The 1951 Refugee Convention; the 1967 Refugee Protocol; the 1981 Report of the Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees; European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted* (recast) OJ L 337/9; Finland, *the Aliens Act (301/2004, amendments up to 1152/2010 included)* ; Denmark, *the Aliens (Consolidation) Act Number 863 of 25 June 2013*; Norway, *the Immigration Act*, 15 May 2008; the Swedish Code of Statutes, Act amending the Aliens Act (2005:716) SFS 2009:1542 of 30 December 2009.

¹²⁹⁰ See for example, AH Richmond, 'Reactive Migration: Sociological Perspectives on Refugee Movements' (1993) 6 (1) *Journal of Refugee Studies* 7.

¹²⁹¹ The Refugee Convention art 1A (2).

¹²⁹² Introductory note by office of United Nations High Commissioner for Refugees, the 1951 Refugee Convention, 3.

protect refugees binds all States, including even those which are yet to ratify the Refugee Convention. However, becoming a refugee is an extremely intricate and complicated process. For example, before protection is offered, a claimant must, *inter alia*, fulfil the alienage principle.¹²⁹³ State sovereignty and non-intervention must be respected. An asylum case when the person is stateless must be lodged as quickly as possible, interviews must be passed, and the whole story about past and future persecution must be credible. An asylum applicant must sever links with the persecuting country, at least before refugee status is offered, otherwise incertitude and dubiety can easily develop.

In cases where inconsistencies are discovered, even long after protection has been offered, refugee status can be revoked. For example, Mahad Abib Mahamud, a bio-engineer, was expelled from Norway after 17 years, and was further permanently prohibited from entering the Schengen area.¹²⁹⁴ The appellant had claimed Somalia was his country of origin, while the authorities insisted he was from Djibouti. The authorities insisted that he had lied about his nationality and identity when he came to Norway in 2000 aged 14. He denied the accusation but the authorities stood by their conclusion.

Refugees can be monitored for exclusion purposes.¹²⁹⁵ Under revocation, refugee status is withdrawn in case the information provided by the refugee to obtain protection was false or important information that would have serious impact on decision by the asylum claimant was concealed. For example, since 2009, the Norwegian Directorate of Immigration has a unit whose primary purpose is to handle cases involving exclusion and security risks.¹²⁹⁶ Economic migrants, on the other hand, are free to move back and forth between their country of origin and country of destination (choice). The predisposition of persecution is missing. Again, although most migrants suffer by occupying demeaning and demanding jobs (low-status jobs like cleaning, serving in bars and restaurants, etc.), they can at least find such work since their networks are often wider. Through their networks, most migrants are aware of the type and the

¹²⁹³ ‘...outside the country of his nationality...’ the Refugee Convention art 1A (2).

¹²⁹⁴ TOSLO-2016-156090 (16-156090TIR/08), judgment of 12 March 2017 [Oslo District Court of First Instance].

¹²⁹⁵ Refugee Convention art 1F.

¹²⁹⁶ Inter-governmental Consultations on Migration, Asylum and Refugees (IGC), *Asylum Procedures: Report on Policies and Practices in IGC Participating States – 2015* (Secretariat, Geneva 2015) 322.

locations (towns/villages) where jobs can be secured. Some migrants train for specific jobs before they embark on the migration process.

In the Nordics, migrants have no rights or obligations to learn the local language. They operate within a different environment, where exploitation through, for example, low wages, and bad working conditions, may be common. Following the above arguments, this thesis interprets the Gap as a violation of refugees' basic human rights. Rights are not 'mere gifts or favours, motivated by love or pity',¹²⁹⁷ whose fulfilment is synonymous with 'gratitude', 'compassion' or '*noblesse oblige*'.¹²⁹⁸ Compassion does not mean 'mere kindness, pity and tolerance', where others (refugees, for instance) are given a chance to thrive or flourish. Refugees have equal rights based on equality and dignity which ought to be respected.¹²⁹⁹

6.2.3 Adulterating the meaning of refugee

It can be wrong *ab initio* to rely on the old approaches to analyze the Gap's causes, effects, and possible solutions. The old approaches are not based on legal and human rights principles. Refugees are purely the subjects of international human rights and discretionary national policies towards issuance of refugee status. Countries normally base their decisions to confer refugee status on acts of reasonableness, good faith, and necessity; on the other hand, when uncertainties regarding refugees' experiences are eroded by academia, politicians, policy makers, etc., the reasons for granting refugee status are watered down. Claims based on immaterial ('constructed') facts, which may also lack evidence or, rely on circumstantial evidence create skepticism towards refugees. When the future orientation i.e. the future aims of refugees becomes the center of attention, refugees easily become pawns in the game of power politics. There are politicians who 'dare to speak out', and who obtain their living by repeatedly attacking the same interests, i.e., refugees' rights. Such attacks violate refugees' substantive rights, like wage-earning or employment rights.¹³⁰⁰ Under such circumstances, the Gap is

¹²⁹⁷ H Shue, *Basic Rights: Subsistence, Affluence and the U.S. Foreign Policy* (2nd edn., Princeton University Press 1996) 14.

¹²⁹⁸ *Ibid.*

¹²⁹⁹ C Gearty, 'Can Human Rights Survive?' in Bailey and Taylor, *Civil Liberties: Cases, Materials, and Commentary* (2009) 4.

¹³⁰⁰ The Refugee Convention art 17, 18; European Union, Directive 2011/95/EC art 2.

symptomatic of, bears the hallmarks of, and is reminiscent of, States' failure to treat refugees' right to work and other economic, and social rights with equal importance and urgency.¹³⁰¹ When the term 'refugee' is watered down by those with power, who else will dare to work to attenuate the Gap?

6.2.4 Regress of refugees' social rights

Notwithstanding the authorities' efforts and the tangible resources used, and despite refugees' individual resilience and determination to find work, the Gap holds its ground firmly. All the effort, be it on the part of the authorities or the refugees themselves, seems to yield little fruit. According to international human rights law, economic and social rights must be monitored so that they do not regress.¹³⁰² In the case of Norway, during the introductory programme,¹³⁰³ each refugee undergoing the obligatory language course receives a yearly gross income equivalent to twice the basic amount paid by the National Insurance Scheme ('2G').¹³⁰⁴ From 1 May 2017, the annual gross figure was 186,562 Norwegian Kroner (about €20,000 or £17,933).¹³⁰⁵ The approximate amount before taxes was 15,500 Kroner (€1,661 or £1,492). After completion of the language course, but still without a job, a person can receive a monthly payment of non-taxable 1G i.e. the National Insurance Scheme.¹³⁰⁶ This contravenes the principle of the progressive realization of human rights.¹³⁰⁷

Again, overdependence on the non-taxed means-tested welfare benefits to survive economically challenges the international human rights principle of obligations of result and

¹³⁰¹ European Union, *Directive 2011/95/EC*, para 34, 17.

¹³⁰² ICESCR art 2(1); CESCR, *General Comment Number 3* para 2.

¹³⁰³ *The Introductory Act Number 80*, 4 July 2003 [Norway] s8.

¹³⁰⁴ NAV, 'Grunnbeløpet i folketrygden' < www.nav.no/no/NAV+og+samfunn/Kontakt+NAV/Utbetalinger/Grunnbeløpet+i+folketrygden > accessed 26 June 2017.

¹³⁰⁵ $93,281 \times 2 = 186,562$ Kroner. The currency was converted using XE Currency Converter < <http://www.xe.com/> > accessed 31 July 2017.

¹³⁰⁶ 7,803 Norwegian Kroner.

¹³⁰⁷ United Nations High Commissioner for Human Rights, *Report, Social and Human Rights Question: Human Rights* (25 June 2007, E/2007/82); ICESCR, Art 12 (1); the CESCR *General Comment Number 3*, para 9; Limburg Principle 72.

conduct by States Parties to the Covenant.¹³⁰⁸ States are obligated to take targeted, deliberate, and concrete steps to ensure progressive realization of economic and social rights of individuals, and no regress is permitted except under special circumstances. By focusing increasingly on erasing the endogenous factors, the authorities have not managed to make refugees, especially those originating from specific continents and/or those with specific religion, attractive to the ‘open labour market’.

6.2.5 Counter-arguments against refugees’ mixed motives

Refugees are often portrayed as having mixed motives when they seek international protection. However, there are two counter-arguments which need attention. Firstly, following human rights principles, even if refugees are indistinguishable from migrants, countries are obliged to protect them if they are persecuted or they will be persecuted if returned to their countries of origin.¹³⁰⁹ Protection involves physical and provision of material welfare. Welfare provisions should normally come from refugees’ provision of labour, if they can have the opportunity to access employment. After naturalization, giving refugees civil and political rights i.e. the right to vote and to contest for political posts, freedom of speech and expression, etc., is not enough. Economic and social rights are also important because, ‘The "full-belly" thesis has it that a man's belly must be full before he can indulge in the "luxury" of worrying about his political freedoms’¹³¹⁰ and ‘One man, one vote, is meaningless unless accompanied by the principle of "one man, one bread.”¹³¹¹ And, the observance of human rights means that all human beings are included; no one is rejected at the threshold.

¹³⁰⁸ European Social Charter art13 (3); CESCR, *General Comment Number 3*.

¹³⁰⁹ United Nations General Assembly Resolution A/RES/71/1, 3 October 2016 (the New York Declaration for Refugees and Migrants)

¹³¹⁰ R Howard, ‘The Full-Belly Thesis: Should Economic Rights Take Priority Over Civil and Political Rights? Evidence from Sub-Saharan Africa’ (1983) 5 *Human Rights Quarterly* 467.

¹³¹¹ IK Acheampong, former Head of State of Republic of Ghana, *ibid* 467.

Secondly, when teaching the local language becomes a right and an obligation,¹³¹² when setting conditions for obtaining permanent residence permits and naturalization on the successful completion and demonstrable understanding of the local language,¹³¹³ or when services like family reunions require a minimum income obtainable only through the nearly impenetrable labour market,¹³¹⁴ this undeniably deviates from respect for and fulfilment of international human rights obligations.

Is it not unfair and unjust to paint refugees as the only group of persons in the world with mixed motives? Should refugees not seek employment for fear of being labelled economic migrants? Should refugees abandon all plans, for example, to reconstruct their erstwhile broken lives as a way of not being ‘mistaken’ for economic migrants? If that were to occur, refugees’ right to work would be meaningless. If individuals and their families do not survive by supporting themselves through work,¹³¹⁵ they lose financially in addition to missing the other advantages associated with labour. Are there many relationships, if any, involving only one motive? For example, a study in Denmark found that from 1994 when refugees from the Balkans and Somalia took up the poorly paid jobs, ethnic Danes replaced cleaning jobs with jobs that demanded more advanced work functions i.e. jobs which needed knowledge of the language or specialized knowledge about Denmark, and the result were higher wages for Danes.¹³¹⁶

¹³¹² AW Enes, ‘Deltakere i Introduksjonsordningen: Veien til en Vellykket Integrering?’ (Participants in the Introduction Programme: the Road to Successful Integration? (Statistics Norway 29 June 2017) < <http://ssb.no/innvandring-og-innvandrer/artikler-og-publikasjoner/veien-til-en-vellykket-integrering> > accessed 11 July 2017. About 8,000 immigrants participated in the Introduction Programme in 2005. By 2016, the number had reached 24,000. Could the increase in number of participants have created more jobs for local language teachers, administrators, etc.?

¹³¹³ *Lov om norsk statsborgerskap (Statsborgerloven)*, LOV-2005-06-10-51 [Norway], entry into force 1 September 2006, s8 (The Act on Norwegian Nationality / The Norwegian Nationality Act Number 51, adopted 10 June 2005, entry into force 1 September 2006).

¹³¹⁴ P Bevelander *et al.*, *Scandinavia’s Population Groups Originating from Developing Countries: Change and Integration* (Nordic Council of Ministers 2013); Cochran E Bech and P Mouritsen, ‘Restricting the Right to Family Migration in Denmark: When Human Rights Collide with a Welfare State under Pressure’ in E Jurado and G Brochmann (eds), *Europe’s Immigration Challenge: Reconciling Work, Welfare and Mobility* (IB Taurus 2013) 169-184, 174.

¹³¹⁵ Universal Declaration of Human Rights, Art 23.

¹³¹⁶ N Ebdrup, ‘Innvandringen har ført til bedre jobber og høyere lønn for danskene’ (Immigration has led to better jobs and higher wages for Danes) (Forskning.no (Videnskab.dk) 5 November 2013) < <http://forskning.no/arbeid/2013/11/innvandringen-har-fort-til-bedre-jobber-og-hoyere-lonn-danskene> > accessed 25 February 2014.

Furthermore, as noted by Professor Alan Manning of the Migration Advisory Committee of the United Kingdom, Australia, Canada and New Zealand have had high immigration in the last 50 years but job opportunities for those already there have never been negatively affected otherwise those countries' economies would be in chaos.¹³¹⁷ Therefore, the obligation is upon the authorities and researchers, for example, to rectify the perception that refugees have mixed motives, and one of them is to take away jobs from those already living in the country. Without that approach, refugees' employment rights can never be realized. Both the evanescent and eternal (antidote) to the conundrum (the Gap) lies in the re-conceptualization of refugees' rights in the face of constitutional and international human rights obligations and norms.

6.2.6 The dynamic labour market

Many refugees cannot make any choice regarding employment before completion of the obligatory language courses. They just become passive recipients of the top-down instructions from the authorities. At a certain point, it becomes clear that a refugee cannot find gainful employment, but the original disadvantages he or she came with are continually and continuously blamed. In the process, focus is lost. Labour market dynamism is given less emphasis. Furthermore, employers and organized employees normally protect their interests as an obligation.¹³¹⁸ Debates on refugees are often politically polarized and charged. For example, 'economic hard times' might have incentivized the Danish government to develop the most restrictive family migration policy in the Nordics just to protect the Welfare State.¹³¹⁹ Article 8 of the European Convention on Human Rights might have been breached since the restrictions potentially contributed to discrimination because of 'socio-economic status', inter alia.¹³²⁰ Fear of refugees is one of the factors often expressed. It is thus doubtful whether the labour market can willingly and graciously consider employing refugees whose motives are assumed to be

¹³¹⁷ S Bjørnstad, 'Professor: «Det er rett og slett ikke tilfelle at innvandrere tar jobbene fra dem som allerede bor i landet»', Aftenposten (10 January 2017) ('Professor: «It is simply not the case that immigrants take away jobs from those already living in a country»') < www.aftenposten.no/okonomi/i/X0g9n/Professor-Det-er-rett-og-slett-ikke-tilfelle-at-innvandrere-tar-jobbene-fra-dem-som-allerede-bor-i-landet > accessed 11 January 2017.

¹³¹⁸ ICESCR art 8; ILO Conventions.

¹³¹⁹ EB Cochran and P Mouritsen, 'Restricting the Right to Family Migration in Denmark: When Human Rights Collide with a Welfare State under Pressure' in E Jurado and G Brochmann (eds), *Europe's Immigration Challenge: Reconciling Work, Welfare and Mobility* (IB Tauris 2013) 159-184, 169.

¹³²⁰ Ibid 171.

mixed or unknown. A different approach focusing more on exogenous factors is needed and is being sought. The general way the economic system in the Nordics is organized, the role of trade unions, practices of discrimination, and lack of commitment to refugees' economic and social rights by the authorities, are some of the exogenous factors which refugees themselves cannot do much to conquer on their own.

6.3 Exogenous factors

The Nordics' universal and comprehensive welfare system, which absorbs refugees under the Gap, is built on pillars of solid democracy, reciprocity, solidarity, or fellowship (distributing resources fairly), and the unwavering belief in equal opportunities for all where participation in gainful employment is a precondition for social inclusion.¹³²¹ Norms of social justice coupled with strong beliefs, and respect for and protection of human rights, are also characteristics of Nordic society. The welfare system is employment-based. Substantial benefits accrue to those in the labour force. Access to employment is the main avenue to obtain income. Lower aggregate income during people's working lives means less pension too. Providing employment directly respects the right to work,¹³²² according to the constitutions of Denmark, Finland, and Norway; the same applies under the Revised European Social Charter in Sweden.

Refugees' right to work, an economic and social right, is one of the internationally recognized fundamental rights whose neglect results in the Gap. Failure by States and private employers to respect such a right results in its violation. The right to work did not appear by accident. It is not a fruit which, after becoming ripe, fell off the tree to be picked up by a 'lazy' boy who would not climb the tree despite his hunger.¹³²³ Article 23 of the Universal Declaration of Human Rights was debated by trusted representatives of their countries of the time. Its *raison d'être* and importance cannot just be ignored. Work delivers a whole range of benefits: consumption is stimulated, incomes are redistributed, the *quid pro quo* requirement before accessing welfare benefits is met, equality of opportunities and outcomes is achieved, respect for

¹³²¹ See for example, M Mikkola, *Social Human Rights of Europe* (Karelactio 2010) 5-8.

¹³²² Universal Declaration of Human Rights art 23; ICESCR art 6.

¹³²³ See, for example, Mr. Altman of Poland's arguments in the 'Summary Record of the Hundred and Thirty-Ninth Meeting of the Third Committee, A/C.3/SR.139,' 16 November 1948 in WA Schabas (ed), *The Universal Declaration of Human Rights: The Travaux Préparatoires, Vol III, September to December 1948* (CUP 2013) 2600.

dignity, self-esteem, self-realization, and financial autonomy are delivered, and refugees are included in wider society. Respect for the right to work is respect for persons' capabilities, as expounded by Amartya Sen¹³²⁴ and Martha Nussbaum.¹³²⁵

Despite the numerous advantages tied to work, the labour market does not absorb refugees at defensible levels: this goes against the constitution of Finland, which states: 'Everyone has the right, as provided by an act, to earn his or her livelihood by the employment, occupation or commercial activity of his or her choice... the public authorities shall promote employment and work towards guaranteeing for everyone the right to work'.¹³²⁶ Likewise, Norway's constitution¹³²⁷ and that of Denmark¹³²⁸ too have similar provisions. Accordingly, respect for and protection of the right to work generally lie within the ambit of government authorities. States are expected to pursue employment policies which ensure that 'there is work for all who are available for and seeking work'.¹³²⁹ Contracting Parties are under a duty 'to accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment';¹³³⁰ and 'there is freedom of choice of employment and the fullest possible opportunity for each worker to qualify for, and to use his skills and endowments in, a job for which he is well suited, irrespective of race...national extraction or social origin'.¹³³¹

Could it be true that individuals shall not sell their labour to the highest bidder because labour is not a commodity as in the *laissez-faire* (perfect competition) labour market?¹³³² As such, toiling or scratching for a living for day-to-day survival may not always be necessary under

¹³²⁴ A Sen, *The Idea of Justice* (Belknap Press 2009).

¹³²⁵ MC Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (The Belknap Press 2006) 155.

¹³²⁶ The Constitution of Finland 11 June 1999 (731/1999) s18.

¹³²⁷ Art 110

¹³²⁸ Constitution of 1953 s75 (1).

¹³²⁹ ILO, *Employment Convention 122*, 9 July 1964 art 1(2) (a).

¹³³⁰ European Social Charter art 1.

¹³³¹ Ibid.

¹³³² ILO, *Declaration of Philadelphia*, 10 May 1944 art I (a).

certain conditions.¹³³³ But nationals as well as ordinary migrants do actively participate in gainful employment at appreciable levels. Do they not sell their labour in the process? Why not refugees? In the absence of productive work, the authorities are expected to make positive inputs to safeguard equality of opportunity for all in a just, fair, and democratic society. States have a legal duty and obligation to provide citizens with free goods and services, at least at minimal level, for as long as the need is demonstrated.¹³³⁴ It is even justiciable¹³³⁵ in cases where the authorities fail to honour the obligation of minimum existence, since ‘everyone has the right to work... and to protection against unemployment’.¹³³⁶

However, refugees are told that the Nordic labour market is free, fair, and open; and that failure to participate in income-generating activities is not a reason to go to bed on an empty stomach. As a practical demand, the authorities expect individuals (refugees) to find their niche or ‘brand’ in the ‘perfectly competitive’ labour market system, if they are to be employed and therefore avoid falling victim to the agonizing Gap. The extent to which the labour market is free and fair is highly debatable. Examples of practices that disadvantage refugees include, but are not limited to, recruitment for entry-level jobs done through word-of-mouth, prioritizing internal job applicants, the requirement for perfection or near perfection in the local language i.e. impromptu and spontaneous flow of words, demanding qualifications or qualities not required for the job as genuine occupational requirements,¹³³⁷ and giving a chance to current employees to forward the names of possible candidates to fill new or vacant posts. Such practices may seem to be neutral but they are symptomatic of, and are synonymous with, discrimination.¹³³⁸ They are inconsistent with established laws and judicial practices against discrimination.

¹³³³ Art III (d), Declaration of Philadelphia.

¹³³⁴ ICESCR art 9; European Social Charter art 13(1) (3) 14.

¹³³⁵ CESCR, General Comment Number 3, para 5; CESCR, General Comment Number 9 para 3.

¹³³⁶ UDHR art 23 (1); ICESCR articles 6, 7, 8 (right to work and rights at work); ICERD art 5(e) (i); CEDAW art 11 (1) (a); Convention on the Rights of People with Disabilities (CRPD) art 27; Migrant Workers Convention art 52 - 55; The Refugee Convention art 17, 18 and 19.

¹³³⁷ European Union, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation OJ L 303, 2 December 2000 art 4.

¹³³⁸ *Non-discrimination Act (1325/2014)* [Finland] s13; *Consolidation Act Number 1349* [Denmark] 1(3); *Discrimination Act (2008:567)* [Sweden] 4(2); *Act relating to a Prohibition against Discrimination on the basis of Ethnicity, Religion and Belief (the Ethnicity Anti-Discrimination Act)* Number 60 of 21 June 2013 [Norway] s6.

6.3.1 Misunderstanding or misuse of the welfare system?

The universal welfare system which absorbs refugees was built to, *inter alia*, materially, and financially take care of those who are unable to take care of themselves, and are practically incapable of continuing the struggle of providing an income for themselves through work, for instance.¹³³⁹ Contrary, it was not built to circumvent the wage system. But because demonstrable need is the trigger criterion for obtaining welfare assistance, the system benignly supersedes the labour market. The infinitesimal resources provided, however, are but short-term palliatives. From antiquity to the current era of human rights, meeting the minimum level of resources needed to survive in the immediate environment is not the only objective of human existence. Refugees too, as a matter of urgency, have an extra need to tap into their mental capacities as well as their physical strength to earn their living by providing labour, and for self-realization, just like the general population. The means-calculated resources have been unable to salvage refugees from monetary and material poverty, a curse capable of being handed down to the next generation. The reality contradicts the International Labour Organization's observation: 'Poverty anywhere constitutes a danger to prosperity everywhere'.¹³⁴⁰ Interpreted differently, poverty among refugees constitutes a danger to the whole country (society), because integration is retarded.

Poor parents often have poor children. In some refugee communities, over 60 per cent of children lived in homes characterized by persistent poverty (i.e. remaining poor for three consecutive years).¹³⁴¹ Social exclusion and exclusion from the consumption of certain products increases with the same intensity and strength. When consumption stagnates, governments spend more on welfare benefits instead of widening the tax base. The gap between the haves and have-nots, even among refugees with a job and those without, is exacerbated. The result is further

¹³³⁹ See for example, E-A Gösta and W Korpi, 'From Poor Relief to Institutional Welfare States: The Development of Scandinavian Social Policy' in R Erikson et al (eds), *The Scandinavian Model: Welfare States and Welfare Research* (M.E. Sharpe 1987) 39.

¹³⁴⁰ ILO, *Declaration of Philadelphia* art I(c).

¹³⁴¹ S Langeland et al., '*Fattigdom og Levekår i Norge: Tilstand og Utviklingstrekk – 2016*' (Rapport 4 Arbeids- og Velferdsdirektoratet, Oslo 2016) ('Poverty and Living Standards in Norway: Conditions and Developments – 2016, Report 4, Labour and Welfare Directorate, Oslo 2016); M Bhuller og EE Brandsås, '*Fattigdomsdynamikk blant Innvandrere: En Empirisk Analyse for perioden 1993-2011*', Rapporter 40/2013 (Statistics Norway, Oslo-Kongsvinger 2013) (Poverty Dynamism among Immigrants: an Empirical Analysis for the Period 1993 – 2011 Report 40/2013 Statistics Norway, Oslo-Kongsvinger 2013).

polarization of society. Whether too hyperbolic or not, the welfare system protects refugees in need but to be in the system for many years is destructive. When, for example, refugees spend most part of their productive years searching for jobs which turn out to be only fanciful or chimerical, and when searching for work itself becomes a full-time job, welfare benefits can increasingly be interpreted as a source of political power to control those in need, and a means of social stratification. Such macroscopic exogenous factors have much to do with the authorities and the wider society, and not the refugees' individual actions.

6.3.2 'Unattractive' refugee labour?

Is the labour which refugees would provide so unattractive to employers, or is there a labyrinth of other issues behind the Gap? Refugees' labour is deemed manual or semi-skilled. Labour can easily be obtained from other migrants and nationals. The Nordics too are technologically advanced economies which depend less on physical labour. However, it has not yet been satisfactorily explained why nationals and other migrants whose skills are similar or are broadly comparable to those of refugees are in employment while refugees are not. Shouldn't refugees in similar (analogous) positions or comparable situations not be treated alike? If high technology industries, for example, recruit tech-savvy immigrants, the employment position of unskilled, semi-skilled and low-tech nationals and other migrants should equally be distorted. Under similar conditions, refugees suffer disproportionately and unjustifiably. The uncertainties in the labour market which result from competition from 'outsiders' is partly solved by strong trade unions to which most nationals ('insiders') with jobs belong.

Trade unions have a natural and legal duty to advance their members' rights. States are obliged to respect and, to the extent that they can, promote or not interfere with labour rights. When unions collectively bargain for wages and other conditions of work, such as the near-impossible expulsion of incumbent workers irrespective of productivity, or influencing management regarding whom to hire, the employer (capital) is controlled to some extent. The tripartite agreements between trade unions, employers and governments often contain what is right, fair, and just for the trio. The fear of a negative reaction from incumbent workers can even intimidate management into not hiring staff from outside so as not to upset the *status quo*. Reserving cumulative benefits for incumbent workers could be a rational choice. Tying numerous benefits to labour, for instance, by overpricing wages, harassing new employees in

anticipation of wage underbidding, incumbent workers' rights to silently protest by taking frequent and longer sick leave, etc., are some of the examples of exogenous factors which the authorities too cannot rectify easily since some are legally sanctioned. Changing the *status quo* can result in protests which can even change the political landscape. The probability of a refugee getting a job in such an environment is minute unless the authorities revisit principles derived from international human rights standards.

6.3.3 Continuation of ideological battles through the labour market?

There seem to be unresolved ideological battles between employers, i.e. those with power, the possessors of convertible capital, on one hand; and workers, the possessors of inconvertible labour (capital), on the other. Normally, labour is productive only between certain ages. Workers have no ability to organize joint action to defend their rights unless organized. Capital, on the other hand, can be converted into different activities, for example, investments, where it can circulate in perpetuity. But because labour is invariable, and is a basic element of its owner, unions are justified in defending the rights achieved under collective bargaining. When a demand for high technology is initiated by capital, for example, it can make unskilled and semi-skilled labour obsolete. Incumbent workers have nothing to hold on to except to protect the already existing jobs. New entrants to the labour market (refugees, for example), can be rejected since they have not been part of the historical and ideological battles that unions have fought and still fight with employers. Memories of victories or losses are always there. It would be close to naivety to argue that subtle ideological battles between employers and workers have totally diminished. It can also be the case that the authorities do not negotiate with unions on behalf of refugees. Consequently, the unorganized refugees are hardly likely to be welcomed into a labour market partly controlled by unions. Consequently, escaping the Gap through employment controlled by unions is harder, if not impossible. Why the authorities are not tackling the issue from at least one of its sources is difficult to fully comprehend. Apart from the influence of trade unions, there are other exogenous factors, indirect discrimination, that still contribute to the causes of the Gap.

6.3.4 Discrimination and the prohibited grounds

This thesis argues that discrimination against refugees is not an isolated or rare occurrence even though discrimination, harassment, instruction to discriminate and victimization are prohibited at national,¹³⁴² regional¹³⁴³ and international¹³⁴⁴ levels. Discrimination could be one of the biggest obstacles to the many efforts designed to mitigate, attenuate, and ameliorate the Gap. Whether refugees re-educate, train or re-train themselves¹³⁴⁵ so that rights of equal treatment and opportunities in employment, etc., are acquired, the possibility of suffering from the Gap is real. Despite the general lack of causal linkages (i.e. proof beyond reasonable doubt that the Gap is a result of, inter alia, States' failure to respect and protect refugees' rights), suffering from discrimination because of a protected characteristic does occur.¹³⁴⁶ Specifically, refugees whose religion is not evangelical Lutheran, or whose ethnicity is non-European, are over-represented among the unemployed, the poor and those who over-depend on State welfare benefits. Non-European names - which nearly all refugee possess - are not very popular with many employers. Rejecting non-European names is one of the easiest and quickest way to eliminate candidates from job interviews.¹³⁴⁷ Those eliminated in this way can hardly imagine that they were treated differently and unequally, and therefore suffered a disadvantage or detriment. The difference in treatment is neither objectively nor reasonably justified, nor does it pursue a legitimate aim. The means applied to realize the objective lacks proportionality.

Consequently, the acquired country-specific competencies become stale and merely symbolic. Rejection by employers results in suffering from an 'ethnic penalty'. Long-term unemployment which is highly connected to the Gap leads to lost earnings and to people giving

¹³⁴² Denmark, *Consolidation Act number 1349*; Finland, *Anti-discrimination Act (Act 1325/2014)*; Norway, *Anti-Discrimination Act (Act number 30)*; Sweden, *Discrimination Act (2008:567)*.

¹³⁴³ European Union, *the Race Equality Directive 2000/43/EC*; *the Equality Framework Directive 2000/78/EC (equal treatment in employment and occupation directive)*; *Directive 2004/113/EC (dealing with matters of equality between men and women in accessing goods and services)*; *the Equal Treatment Directive 2006/54/EC (implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast))*; the 1961 European Social Charter, art E.

¹³⁴⁴ UNGA, Res 2106 (XX) (adopted 21 December 1965 entered into force 4 January 1969); ILO, *Convention concerning Discrimination in Respect of Employment and Occupation* (adopted 25 June 1958 entered into force: 15 June 1960, C111); ILO, *Discrimination (Employment and Occupation) Recommendation R111*.

¹³⁴⁵ Charter of Fundamental Rights of the European Union art 14, 29.

¹³⁴⁶ ECHR art 14.

¹³⁴⁷ See the example of Mahad Abdi Jama (section 2.3.2 in this thesis) who had to use a fictitious name ie Mats Pettersen before he could be called for a jobb interview.

up the search for work. Avoiding applying for jobs and services from employers and service providers known to discriminate can be a natural and psychological reaction by refugees. The capacity to make 'right' choices by refugees quickly crumbles. The authorities too can be skeptical towards refugees' intellect and ability to deal with the external environment (stiff competition within the 'free' labour market) or their capacity to solve complex issues once employed. Without resources, refugees' independence and autonomy, dignity, and full and unconditional participation in society, etc., remain illusory.

Matters can get messy and more complicated when refugees start to doubt the resolve, role, and capacity of the authorities to solve the unemployment dilemma. If the authorities fail to mitigate the Gap, lack of trust can develop easily, which further complicates the already complex situation of poor integration. Discrimination through prejudices, stereotypes, or the belief in the halo effect, etc., contributes to and sustains the Gap to some extent. It occurs despite the various anti-discrimination laws often supplemented by the transposition of European Union directives regarding equality of opportunities, *inter alia*. One type of discrimination which long-term unemployment drives its victims towards is age discrimination. It comes 'naturally' because of the years refugees spend searching for jobs. Age discrimination affects all persons but disproportionately impacts on those with refugee background, since they spend their most productive years acquiring skills and competencies which they never use.

Anti-discrimination laws shift the burden of proof to the respondent, with an assumption that discrimination did indeed occur in fact and in law. This can help but more requirements may still be needed. Evidence of the occurrence of the prohibited conduct leading to culpability may be hard to come by. Causality is always the issue, in addition to covertness and neutrality in claims of indirect discrimination. However, under the genuine and determining occupational requirement, for instance, an employer can discriminate if there is a legitimate aim which is objectively justified and is proportional to the means employed. Finally, a claim of discrimination must be admissible, the adverse effect (detriment) suffered must be detectable, and the detriment must causally be connected to the action(s) of the respondent. On the other hand, although there is an obligation to protect refugees from unemployment, there is currently no law to force an employer to hire refugees. Whatever form the discrimination takes, it nevertheless weakens most of the efforts designed to address the Gap, while further compounding the process of crafting remedies.

6.3.5 General disrespect of human rights

The Gap is partly a consequence of disrespect for the economic and social rights of refugees. When most programmes adopted to ameliorate the Gap end up achieving less than their intended goals, the authorities can hardly escape criticism. Could there be a lack of good faith in the execution of the designed policies? When the obligation to respect the right to work is not observed, other connected rights are also violated. States have an obligation to guide individuals to achieve their freedom and liberty, dignity, self-esteem, and self-actualization. Dignity and equality are substantive rights meant to protect individuals from unjustified discrimination. States have a duty to respect and protect human dignity; otherwise human beings can be made to be mere objects of the actions of the State.¹³⁴⁸ This came from a ruling from the Federal Constitutional Court of Germany (the ‘*Bundesverfassungsgericht*’) that invalidated the ‘Aerial Security Act’, which had authorized the shooting down of any aircraft in case where there was an intention to kill human beings, if such force was the only means to avert the immediate danger.¹³⁴⁹

Human rights are conceptually, hermeneutically, and operationally interconnected; they are intertwined, indivisible and interdependent.¹³⁵⁰ When the right to work is violated, other rights like property rights and health are also violated. When the number of refugees in precarious jobs fails to decline, or when no stable work is available, refugees may find it hard to enjoy the right of joining a trade union of their choice. Equality rights (whether substantive, equality of results or equality of opportunity); or corrective equality (distributive justice), become utopia. To prevent acts of human rights omission and/or commission, the primary duty-bearers are State authorities and private actors. The acts of omission and/or commission lead to a failure to fulfil positively the social duties expected of the authorities. Because of the imbalances in power structures, it is hard for refugees to escape the resulting effects of material poverty as well as deprivation of other resources, which also decimates their capacity to make rational choices beyond their immediate wants.

¹³⁴⁸ N Naske and G Nolte, “Aerial Security Law”, Case Number 1 BvR 357/05. 115 BVerfGE 118 (2007) 101 (2) *The American Journal of International Law* 466.

¹³⁴⁹ Ibid.

¹³⁵⁰ UNGA, *Vienna Declaration and Programme of Action* (12 July 1993, A/CONF.157/23).

Accordingly, a person deprived of income from work suffers other cumulative disadvantages where financial resources are needed to achieve other objectives. State authorities are more occupied with calculations and gathering statistics on what it costs society to host refugees from poor and developing countries. In less than a decade, in Norway, two commissions of inquiry were set up. The official Norwegian reports on welfare and migration¹³⁵¹ and NOU 2017:2, Integration and Trust)¹³⁵² were concerned with, *inter alia*, the capacity of the welfare system to meet the challenges caused by increased immigration. Once again, refugees were partly regarded as ‘passive recipients’ (i.e. they were not contacted. Data was gathered from official statistics); whether they can participate in the production of goods and services is important but not as relevant as what they take out of the system. Are States not letting refugees down by failing to respect their right to work?

Effective remedies, the panacea to the Gap, for example, can be realized if the authorities and other stakeholders are committed to respecting human rights as envisaged by the Universal Declaration of Human rights among others. Remedies can begin with legislation, where a bill to give financial relief for the lost earnings is passed. The judiciary can also play an active role by admitting cases with less evidence if persistent poverty among refugees are involved. The authorities can open dialogue with employers, and mandatory relief can be provided. The Government authorities are tasked with provision of remedies because they control the statutory budget and all the available resources, including unlimited access to expertise and knowledge. The Nordic States are under obligation to protect, respect, fulfil and promote human rights; and to show concern about equal treatment to all citizens. In the long-term, when the Gap becomes permanent, there are hardly any objective justifications. In the long-term, are there many legitimate reasons State authorities can advance for failure to attenuate the Gap? This is because steps have been taken, measures have been adopted and implemented, but the results are minimal.

¹³⁵¹ ‘NOU 2011:7, Velferd of migrasjon – den norske modellens framtid’ (Barne-, likestillings- og inkluderingsdepartementet, Mai 2011) (Norwegian Government Reports 2011:11, Welfare and Migration: the future of the Norwegian Model, Ministry of Children, equality and the Department of Inclusion). The whole document in norwegian is available at < www.regjeringen.no/contentassets/7a375420185844a1bfacbbd7698bf13e/no/pdfs/nou201120110007000dddpdfs.pdf > accessed 30 October 2017.

¹³⁵² Ministry of Justice and Public Security, ‘Integration and Trust: Long-Term consequences of High Immigration – Translation of chapter 1.1’ < www.regjeringen.no/contentassets/c072f7f37da747539d2a0b0fef22957f/en-gb/pdfs/nou201720170002000engpdfs.pdf > accessed 30 October 2017.

6.4 Thesis findings

After duly evaluating and synthesizing Eleanor Ott's literature review on the labour market integration of resettled refugees in multiple countries, and comparing it to the research hypothesis and other country-specific research, reports, and policy papers, etc., the thesis confirms what earlier researchers have found: that intrinsic (endogenous) factors are more important in the short-term while exogenous factors dominate the arena in the long-term. Because earlier researchers' solutions have not been able to appreciably dislodge the Gap, the thesis had to be innovative. For the first time, a novel approach through human rights has revealed, quite authoritatively that:

- I)** In the long-term, the prime factors behind the Gap are mostly exogenous. Therefore, any proposals geared towards ameliorating the Gap but which fail to focus on the structure of the Nordic society, i.e. the macro-societal issues, are bound to generate only partial success. The authorities focus less on employers (public and private) and pay no or minimal attention to the influence of trade unions. The power to hire a candidate rests in the hands of management which works in conjunction with unions. However, the thesis does not claim, even in the narrowest sense, that the role of endogenous factors is just inconsequential.
- II)** In the long-term, failure by the authorities and other decision-makers to treat the Gap as a violation of refugees' economic and social rights, sustains and perpetuates it. Consequently, other rights like equality, dignity, protection against non-discrimination, etc., rights deemed fundamental in fair and just societies like the Nordics, are demeaned.
- III)** Major factors that unnecessarily prolong and make the Gap more intractable are government policies and administrative decisions, etc., whose centre of interests, targets, and activities are refugees' vulnerabilities. Naturally, such vulnerabilities should not be treated as perennial but rather transitory.
- IV)** The authorities have failed to differentiate between the short-term and long-term needs of refugees. Refugees' needs in the initial years completely differ from those in the long-term. After five to seven years, the Nordics are still not dealing with the initially frightened and disorientated refugees in a bewildered clueless society.

The extent to which the Gap is a violation of refugees' economic and social rights needs to be further justified. To start with, 'everyone has the right to benefit from social welfare services'.¹³⁵³ It is a right well established in welfare laws. Failure to honour this obligation can be justiciable. Furthermore, Contracting Parties are bound by obligations to, for example, provide everyone with work by aiming at full employment; effectively protect the right to work whereby the worker earns his living in a freely chosen occupation; and provide free employment services like appropriate vocational guidance, training and rehabilitation to all workers without discrimination.¹³⁵⁴ The Norwegian Human Rights Act¹³⁵⁵ mentions that Parts I-V of the International Covenant on Economic, Social and Cultural Rights, *inter alia*, 'shall have the force of Norwegian law insofar as they are binding for Norway'.¹³⁵⁶ Therefore, human rights are part of the Norwegian constitution. If they are disrespected, the constitution too is breached. Again, because of the '*Lex superior*' principle, ratified human rights covenants occupy a higher position than any laws adopted domestically if they pass the scrutiny of interpretation by the relevant authorities. Any law passed by a majority of parliamentarians has no legal force if it violates the constitution. Therefore, a constitutional right stands above policies, measures, and decisions, which may change abruptly depending on, for example, the type of government in power. Because the Gap is intimately interconnected with social policies which are legally binding, applying law to mitigate the Gap is justified.

To understand human rights and the obligations they impose, there is a need to reflect, re-conceptualize and apprehend their general function in society. They are the mirror through which the notion of a just and fair society - rights considered fundamental for every person's well-being and dignity - are meant to be reflected, monitored and implemented through treaties, declarations, conventions, charters, directives and resolutions, etc.¹³⁵⁷ Human rights law is concerned with the 'protection of the basic interests from outside interference, to maintain those interests inviolate, and affirm and reinforce their importance and that they ought to be held in the

¹³⁵³ Revised European Social Charter (3 May 1996 entry into force: 1 July 1999, ETS Number 163) art 14.

¹³⁵⁴ European Social Charter (18 October 1961 entry into force: 26 February 1965 ETS Number 35) section 1-4.

¹³⁵⁵ Norway, *the Human Rights Act Number 30* (21 May 1999)

¹³⁵⁶ *Ibid* section 2.

¹³⁵⁷ Y Haeck et al.(eds), *Human Realization of Human Rights: When Theory Meets Practice. Studies in Honor of Leo Zwaak* (Intersentia Publishing 2013) 1.

utmost respect'.¹³⁵⁸ A starting point to understand human rights is to analyze the content and intention of the Universal Declaration of Human Rights.¹³⁵⁹ When human rights are divorced from the existence of human beings, bizarre things such as genocide and extreme marginalization of minorities, refugees, etc., that shock the conscience of humanity, can occur. Refugees' persistent poverty in countries not suffering from resource bottlenecks, can be a form of human rights violation. Instinctively, human beings in their natural state tend to pursue their own goals aggressively, disregarding the rights of others; but when they become 'social animals', they live by crystallized rules of behavior which are universally acceptable.¹³⁶⁰ For that reason, crafting remedies based on human rights principles can achieve greater results if the will from those in authority is there.

6.5 Original contribution to contemporary knowledge about the Gap

The ultimate purpose of the thesis is to find a solution to the Gap while incrementally creeping towards its wider understanding. The solution appears through new knowledge (reality) or approaches used to engage it. Epistemological issues of how we know what we know, and the ontological questions of how reality (the Gap in this case) is interpreted, is part of the chapter. Traditionally, there are two basic ways through which something can be known:¹³⁶¹

- a) Through senses. What is known can be a product of senses of smell, hear, see, touch and taste. According to this observation, knowledge is sensory. It is the approach taken by positivists and is more inclined to the objective stance. It comes from the Aristotelian law of non-contradiction. According to this law, opposite assertions cannot be true at the same time. A bucket of water, for instance, cannot be cold and hot at the same time. Said differently, the Gap cannot exist to the extent it is today if refugees' human rights are fully respected.

¹³⁵⁸ Jason NE Varuhas, *Damages and Human Rights* (Hart Publishing 2016) 345.

¹³⁵⁹ *ibid*

¹³⁶⁰ A Cassese, *Human Rights in a Changing World* (Temple University Press 1990)155-56.

¹³⁶¹ J Garvey and J Stangroom, *The Story of Philosophy: A History of Western Thought* (Paperback Edition, Quercus Editions Limited 2013) 205.

- b) Thinking about something. Intuition: why does the Gap exist? Why does it persist and why is difficult to handle? How does it affect the refugees? Could the solution lie in international human rights law? This kind of thinking relies heavily on intuition, takes subjective approach and it is what this thesis is inclined to.

6.6.5 Contribution through the human rights approach

The new knowledge generated is synthesized and integrated into:

- a) the overall importance of the thesis and;
- b) the impact the research can have on current and future policies geared towards the mitigation of the Gap after considering the recommendations.

According to the available literature, a lot has been written about the Gap. Many solutions have been suggested. However, success has been minimal. Why? This could imply:

- a) that the basis on which the hitherto proposed solutions are based is weak, or is not multi-faceted as the Gap itself;
- b) the solutions themselves could be inappropriate or even wrong.

Although a lot has been evinced as the probable causes of the Gap, and various solutions propounded, the problem has remained. As such, the gap in knowledge or literature has been filled by synthesizing the Gap with reference to international human rights obligations States have to fulfil, promote and protect. Domestic legal provisions as well as regional legislations based on normative approaches to protect economic and social rights supplement international human rights provisions. The justification for an appeal to international human rights standards lies in their ability to solve rights-based complex, social and economic problems. Again, the Nordics' culture of respect for human rights and other binding laws makes an appeal to the law a viable option. Human rights, '*sensu stricto*', are universally applicable to all persons and at all times.¹³⁶² In a wider sense, human rights are 'practical conclusions which, although justified in different ways by different persons, are principles of action with a common ground of similarity for everyone'.¹³⁶³ Rights are not 'mere gifts or favours, motivated by love or pity', and fulfilling

¹³⁶² Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights as amended by Protocol 11 and 14) ETS Number 5, adopted 4 November 1950, Article 1; Human Rights Act (Number 30, 1999) [Norway].

¹³⁶³ J Maritain, 'Introduction', in UNESCO, 'Human Rights: Comments and Interpretations' cited in Beitz, *The Idea of Human Rights* (2009) 21.

the demands of a right should not be synonymous with gratitude, compassion or *noblesse oblige*.¹³⁶⁴ Compassion in the language of rights is not the same as ‘mere kindness, pity and tolerance’.¹³⁶⁵ International human rights instruments create duties and obligations which are legally binding and capable of justiciability. When the Nordic States embedded rights in their domestic laws, beginning with the constitution, they intended to abide by those laws. In Finland, for example, the constitution states: ‘The public authorities shall promote employment and work towards guaranteeing everyone the right to work’.¹³⁶⁶ Similar wording is found in both the Norwegian and Danish constitutions. If the authorities interpret the Gap as a breach of one of the constitutional rights, i.e. the right to work, finding solutions no longer depends on the willingness of the State to act, but becomes a constitutional duty to be fulfilled by those with power, *inter alia*.

A State violates its obligations if it fails to respect, fulfil or protect one or all the human rights obligations.¹³⁶⁷ Any State Party to the Covenant¹³⁶⁸ ‘undertakes to take steps’, ‘by all appropriate means, including particularly the adoption of legislative measures’, ‘with a view to achieving progressively the full realisation of the rights’ ‘to the maximum of its available resources’, whether individually or through international assistance and cooperation and ‘without discrimination’.¹³⁶⁹ In cases of failure to respect or fulfil a right, States are expected to provide redress through provision of ‘effective remedies’,¹³⁷⁰ which may be juridical.¹³⁷¹ Other remedies can include ‘adequate reparation taking the form of restitution, compensation, rehabilitation, satisfaction or guarantees of non-repetition’.¹³⁷² The remedies must be effective,

¹³⁶⁴ C Gearty, ‘Can Human Rights Survive?’ (CUP 2006) in SH Bailey and N Taylor, *Civil Liberties Cases, Materials, and Commentary* (6th edn OUP 2009) 4.

¹³⁶⁵ C Gearty, *ibid* 4.

¹³⁶⁶ The Constitution of Finland, (731/1999, amendments up to 1112/2011 included) (adopted 11 June 1999) section 18.

¹³⁶⁷ Maastricht Guidelines 6.

¹³⁶⁸ ICESCR art 2.

¹³⁶⁹ ICESCR art 2(2); ICCPR art 26.

¹³⁷⁰ Maastricht Guidelines 22.

¹³⁷¹ Limburg Principles 9; UN CESCR, *General Comment Number 9: The Domestic Application of the Covenant* (3 December 1998 E/C.12/1998/24).

¹³⁷² Maastricht Guidelines 23.

implying that they are real and practical, not just illusory.¹³⁷³ If, after quantification, compensation is so derisory to the extent that of raising issues of effectiveness of redress, Article 13 of the European Convention on Human Rights may be violated.¹³⁷⁴ Violating a convention right or the protocol thereto may qualify the injured party just satisfaction from the European Court of Human Rights in case the ‘internal law of the High Contracting Party concerned allows only partial reparation to be made’.¹³⁷⁵

No State can excuse itself for the failure to provide remedies domestically if a right is violated. In *Burdov v. Russia*,¹³⁷⁶ for example, the lack of State funds could not be used as justification for not honouring debt payment reached through court judgment. The State had violated, *inter alia*, the right to protection and peaceful enjoyment of property in accordance with Article 1 of Protocol Number 1.¹³⁷⁷ The only justification can come from showing that the remedy being sought is inappropriate after considering other means.¹³⁷⁸ As far as the Gap is concerned, other means have partially failed to dampen its effects. States will find it hard not to provide effective remedies, whatever form they take.

Because human rights are basically interrelated, universal, indivisible, and interdependent,¹³⁷⁹ respect for one right can lead to respect for another, where social justice is achieved. Respect for or violation of one right can result in realization or breach of another. When refugees’ freedom to access gainful employment through the right to work is achieved, respect for the ‘right to own property alone as well as in association with others’ is realized.¹³⁸⁰ The law further protects property rights.¹³⁸¹ On the other hand, when refugees suffer

¹³⁷³ Office of the United Nations High Commissioner for Human Rights, Economic, Social and Cultural Rights: Handbook for National Human Rights Institutions (Professional Training Series Number 12, HR/P/PT/12, 2005) 28.

¹³⁷⁴ *Wainwright v UK* (2007) 44 EHRR 40, (55). See also Jason NE Varuhas, *Damages and Human Rights* (Hart Publishing 2016) 332.

¹³⁷⁵ European Convention on Human Rights art 41.

¹³⁷⁶ Application Number 59498/00 [2002].

¹³⁷⁷ European Convention on Human Rights as amended by Protocol Numbers 11 and 14 supplemented by Protocol Numbers 1, 4, 6, 7, 12 and 13.

¹³⁷⁸ General Comment Number 9 para 3.

¹³⁷⁹ UDHR; *Vienna Declaration of Programme of Action*, UN Doc. A/CONF.157/23 (1993).

¹³⁸⁰ UDHR art 17 (1).

¹³⁸¹ Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention on Human Rights as amended by Protocol 11 and 14) (ECHR), (adopted 4 November 1950 ETS Number 5); Protocol 1 to ECHR art 1.

disproportionately from long-term unemployment, the right to work¹³⁸² and Article 23 of the Universal Declaration of Human Rights are concurrently violated. Consequently, the ‘highest attainable standard of physical and mental health’ among victims of the Gap is hard to realize.¹³⁸³ When refugees are not given equal opportunities in job promotion to higher levels in accordance with seniority and competence, Article 7(c) of the International Covenant on Economic, Social and Cultural Rights is breached. The application of international human rights standards will reduce the Gap because the law demands that obligations are respected and implemented.

6.5.2 Method and methodological contribution

The Gap is no longer a simple phenomenon only to be studied by sociologists, political scientists, local administrators, etc., using qualitative approaches (inductive reasoning using words, sounds or pictures, etc.); or quantitative approaches (deductive methods associated mainly with numbers and graphs). Such methods are used to plan and critically examine the logic and the components of the Gap, as well as interpret the results obtained. They serve mainly to confirm or negate the existence of the original claim or proposition. The true substance, the essence of the Gap, is involuntary long-term unemployment among refugees, resulting in persistent poverty, which such methods confirm but fail to mitigate because the solutions proposed lack the binding power of law. The failure by authorities to fulfil their obligations is never followed by any consequences. The loss always lies where it falls.

Qualitative and quantitative methods can also suffer from, among others, generalization (the ability to draw inferences from a single study to wider populations, context, etc.),¹³⁸⁴ issues over validity (the degree to which findings from data are correct or precise),¹³⁸⁵ reliability (quality of replicating researching findings),¹³⁸⁶ ethical dilemmas,¹³⁸⁷ poorly designed data collection tools, etc. Issues of interpretation can lead to ‘multiple realities’ where dissimilar

¹³⁸² ICESCR art 6.

¹³⁸³ ICESCR art 12.

¹³⁸⁴ J Lewis et al., ‘Generalising from Qualitative Research’ in J Ritchie *et al.* (eds), *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (2nd edn SAGE 2014) 348-54.

¹³⁸⁵ Ibid 356.

¹³⁸⁶ Ibid 355.

¹³⁸⁷ Ethics is simply the study of what is good, right or virtuous courses of actions.

groups might see or interpret things dissimilarly since each researcher can construct his/her own reality.¹³⁸⁸ For instance, theories about refugees, and motives of flight are sometimes developed based on researchers' understanding of the phenomenon, and not on the established rules and regulations governing each country's migration issues. Other issues connected to interpretation can be multiple-dimensionality i.e. no single research project can look at any concept in its full range of dimensions like history, politics, culture, etc. Ability to understand other dimensions can be severely curtailed if some dimensions are ignored.¹³⁸⁹ Lastly, interconnectivity, where two concepts that are closely interrelated in real life become confused within research.¹³⁹⁰ Using terms like refugee interchangeably with asylum seekers, or concluding that these terms are on a sliding scale, can lead to a failure to craft appropriate solutions. The often-proposed solutions from qualitative/quantitative studies are not grounded in law which implies that they lack a legal basis. The justification for such solutions therefore remains theoretical, lacking the binding force of law.

The law, on the other hand, clearly defines refugees: past and future persecution are the ordinary determinants. Whether refugee status is offered because of persecution, or whether protection is due to humanitarian grounds (subsidiary or complementary), the law is not concerned with refugees' future economic motives. Accordingly, when this thesis drew on national laws, Acts of Parliament and international human rights principles, the Gap primarily became a legal issue. The interpretation is not 'constructed' because the law does not 'manufacture' background facts. The law uses as primary sources legal documents which are unobtrusive and original in nature.¹³⁹¹ By their very nature, legal documents containing rules and regulations and are accurate sources of law because they are not influenced by ordinary opinion of the researchers, politicians, etc. Legal experts interpret them. Justification for the use of such documents is grounded in their preambles. Judicial bodies interpret such documents, leading to consistence and maintenance. The '*pacta sunt servanda*' principle,¹³⁹² for example, requires that

¹³⁸⁸ MB Miles and AM Huberman, *Qualitative Data Analysis* (2nd edn SAGE Publications 1994).

¹³⁸⁹ DR Loseke, *Methodological Thinking: Basic Principles of Social Research Design* (SAGE Publications 2013) 77.

¹³⁹⁰ DR Loseke *ibid* 77.

¹³⁹¹ Declaration, Convention; Covenant; Charters; treaties; court decisions.

¹³⁹² *Vienna Convention on Law of Treaties* (23 May 1969 UN Doc. A/CONF.39/27, 1155 UNTS 331) art 26.

States recognize the treaties they sign as binding which must, in addition, be interpreted in good faith. During interpretation, emphasis is put on, *inter alia*, the ordinary meaning, context, object, and purpose of the treaty,¹³⁹³ ‘subsequent practice’,¹³⁹⁴ and supplementary means of interpretation if there is ambiguity, obscurity, and the avoidance of manifestly absurd or unreasonable results.¹³⁹⁵

Solutions based on legal remedies, which in turn are embedded in the concepts and principles of international human rights law, legally binding laws, and administrative practices, create legal responsibilities capable of justiciability.

On the other hand, qualitative/quantitative-based solutions can depend on ‘understanding’, volition or the discretion of the legislature, executive or anyone with power. The danger lies in resistance, neglect, and the general lack of enthusiasm by those with power because there are no immediate political and legal implications of failure. When qualitative and quantitative methods and methodology are used, they present data on, for example, how many refugees are over-dependent on minimum welfare benefits. They do not explain that such benefits are based on legal principles, as a kind of ‘compensation’ for the lack of access to gainful employment.¹³⁹⁶

This thesis has revealed some of the important *lacunae* and laxities in government policies and administrative practices geared towards mitigation of the Gap, whose genesis is intimately connected to method and methodology. Authorities should not over rely on such methods in finding solutions. Instead, the methods should be complemented by human rights and other relevant laws governing social policies. The authorities and the policy implementers should find ways to fulfil human rights obligations by using all available resources progressively and efficiently. The Nordics should apply for international technical assistance from, for instance, Canada which admits significant number of refugees but which does not struggle with the Gap to the extent of the Nordics. Continuing to blame refugees who otherwise would not be depending on the welfare benefits is another form of stigmatization. It adds misery to refugees’

¹³⁹³ Ibid art 31.

¹³⁹⁴ Ibid.

¹³⁹⁵ Ibid art 32.

¹³⁹⁶ European Social Charter art 12; Universal Declaration of Human Rights art 22. For social and philosophical arguments, see D Dorsey, ‘Toward a Theory of the Basic Minimum’ (2008) 7 (4) *Politics, Philosophy Economics* 423.

experience of persecution in their countries of origin, long-term unemployment, etc., and it will not lessen the effects of the Gap.

6.6 The future of the Gap

Before the future of the Gap is discussed, there is necessity to answer a few questions:

- Do refugees suffer disproportionately from the ineluctable fate of lost earnings (past, current and future)?
- Does the suffering include physical, psychological, moral distress, frustration, and damaged health (mental health issues as aggravating factors)? Health needs to be stressed because it ‘is a fundamental human right indispensable for the exercise of other human rights’.¹³⁹⁷
- Does the Gap permanently disrupt and breaks down refugees’ life plans by making them immobile once access to and participation in gainful employment is permanently lacking?
- Does the Gap retard the overall integration process of refugees and sometimes their offspring?

The findings of this thesis indicate that the answer is ‘yes’ to all the above questions. This raises further questions:

- What is it that refugees are not doing to overcome the Gap?
- What is it that the authorities are not doing to mitigate the Gap?
- Can a target be set to halve the number of refugees grappling with the Gap?
- Are there other ways to approach the Gap since all the old ways yield only partial success?
- What does it mean and how does it feel to live on means-tested welfare benefits for over a decade irrespective of one’s unwavering willingness and capacity to work?

No stone should be left unturned in the search for a panacea for the Gap. After a reasonable passage of time, continuous stay in a country, and a demonstrable desire and willingness to work

¹³⁹⁷ CESCR, *General Comment Number 14: The Right to the Highest Attainable Standard of Health* (art. 12) (adopted 11 August 2000 Document E/C.12/2000/4) para 1.

but without a scintilla of hope, the authorities can find it hard to continue to focus on the endogenous factors. Exogenous factors over which most refugees have no control are the main culprits in the long-term.

6.6.1 Enact ‘Anti-Gap’ statutes, reinvigorate human rights principles and norms

Fixing the Gap requires identification of the discrete events which cause and sustain it in perpetuity. The reasons why the Gap continues to defy well-intentioned remedies is a cause of concern. Normally, before anything broken is fixed, the reasons why it broke down should be identified first. The law, for instance, does not wholly accept Barry Richmond’s observation that predicting the impacts of a decision is hard because ‘sometimes you can push “a ton” and get an ounce, while other times the tickle of a feather brings down the house’.¹³⁹⁸ If the authorities and private employers make it a duty and obligation to employ refugees, especially those who are as qualified and experienced as migrants or nationals, it is possible that the ‘push of an ounce will yield a ton’. The proposition is grounded in the general position which the law enjoys in the Nordics, which is high. Rights, once guaranteed by the executive and legislature, can easily be enforced. Neither the material nor the immaterial inputs into social policies are a bottleneck; nor is the culture of respecting the workings and functionality of systems lacking.¹³⁹⁹ If parliaments enact ‘Anti-Gap’ statutes, or the executive branch of government issues ‘Anti-Gap’ directives, or creates ‘Anti-Gap’ norms through administrative practices, many refugees can participate in economically productive activities. The Gap’s causal linkages and the *prima facie* evidence are not disputable. The authorities as duty-bearers must be reminded of their *ipso facto* obligations to protect, fulfil, respect, and promote human rights, which emanate from internationally ratified declarations, conventions, covenants, and charters or from domestic legislation.

The Nordics, for instance, respect the European Convention on Human Rights as binding. The Convention was conceived and adopted by Europeans for persons living in Europe. The last paragraph of the preamble to the Convention states: ‘Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedoms and the rule of law’...resolved to take the first steps to collectively enforce certain of the rights in the

¹³⁹⁸ B Richmond, *An Introduction to Systems Thinking: ithink* (High Performance Systems, Canterra Parkway 2001) 11.

¹³⁹⁹ M Mikkola, *Social Human Rights of Europe* (Karelactio 2010) 20.

Universal Declaration of Human Rights; and went on to confirm in Article 1 that there was an obligation to respect rights and freedoms and that this right shall be secured to everyone residing in the High Contracting Parties' jurisdiction. Thus, the duty to secure rights of every individual in the Convention falls upon those exercising authority in the High Contracting Parties. The right to work, even though it does not appear in the Convention, is nonetheless important in the European Social Charter. When, for instance, discriminative practices persistently violate refugees' right to work, both the Universal Declaration of Human Rights¹⁴⁰⁰ and the European Convention of Human Rights,¹⁴⁰¹ taken together with Protocol Number 12,¹⁴⁰² have an antidote. The Social Charter¹⁴⁰³ obligates each Contracting Party to treat refugees lawfully residing in its territory, more favourably than other immigrants. The 1950 Ad Hoc Committee on Refugees and Stateless Persons,¹⁴⁰⁴ for instance, noted that refugees must be able to work so as 'to lead a normal life and not be a burden on the national or international community'. Wage-earning employment, self-employment and liberal professions were to be respected. The 1951 Refugee Convention also mentions wage-earning employment and self-employment, stating: 'The Contracting State shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, about the right to engage in wage-earning employment'.¹⁴⁰⁵ The International Covenant on Economic, Social and Cultural Rights,¹⁴⁰⁶ and some General Comments¹⁴⁰⁷ from the Committee on Economic, Social and Cultural Rights all address the same issue, i.e. the right to work.

¹⁴⁰⁰ Art 7.

¹⁴⁰¹ Art 14, 13.

¹⁴⁰² Council of Europe, *Protocol Number 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms* (4 November 2000, ETS Number 177) Art 1.

¹⁴⁰³ European Social Charter, European Treaty Series Number 35 (adopted 18 October 1961, entry into force 26 February 1965), Appendix para 2.

¹⁴⁰⁴ United Nations Ad Hoc Committee on Refugees and Stateless Persons, Ad Hoc Committee on Statelessness and Related Problems, United States of America: Memorandum on the Definition Article of the Preliminary Draft Convention Relating to the Status of Refugees (and Stateless Persons) (E/AC.32.2) (18 January 1950 Doc. E/AC.32/L.4).

¹⁴⁰⁵ The Refugee Convention Art 17(1) and Art 18.

¹⁴⁰⁶ Art 6.

¹⁴⁰⁷ For example, *General Comment Number 18* (adopted 24 November 2005, E/C.12/GC/18); *General Comment Number 12* (The Right to Adequate Food (Art. 11) adopted 12 May 1999, Contained in document E/C.12/1999/5) para 26.

6.6.2 Embrace equality

Addressing issues of equality and non-discrimination can be a milestone in fixing the Gap.¹⁴⁰⁸ Domestic courts should be ready to offer legal remedies to victims of violations of human rights under the Gap by borrowing from the substantive and procedural reasoning developed by the work of the United Nations. Examples include but are not limited to General Comments developed by the Committee on Economic, Social and Cultural Rights,¹⁴⁰⁹ Concluding Observations on State Reports and the Universal Periodical Review. Others are the Limburg Principles¹⁴¹⁰ and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights. Fixing the Gap may also necessitate resorting to directly compensating refugees, and taking positive action that may include mandatory targets in employment.

6.6.3 Disaggregate refugees' unemployment data

Refugees should be separated from other categories of job seekers as a requirement for special measures. The Committee on the Elimination of Racial Discrimination noted that:

‘Appraisals of the need for special measures should be carried out on the basis of accurate data, disaggregated by race, colour, descent and ethnic or national origin and incorporating a gender perspective, on the socio-economic and cultural status and conditions of the various groups in the population and their participation in the social and economic development of the country.’¹⁴¹¹

Unemployed nationals and young entrants into the labour market without relevant working experience, etc. cannot be compared to refugees whose ethnicity, religion, etc. differs from that of the employers and other decision-makers. Refugees are not in comparable situations even with ordinary migrants. Many migrants leave their countries of origin with some prior knowledge of the labour market, even though such knowledge may be imperfect. The experience of

¹⁴⁰⁸ European Union, *Council Directive 2000/43/EC* (Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin, Article 5); Denmark, *Consolidation Act Number 1349 of 16 December 2008* (Consolidation Act on Prohibition of Discrimination on the Labour Market etc.); Finland, *Anti-discrimination Act* (1325/2014) section 5; Norway, *Act relating to a Prohibition against Discrimination on the basis of Ethnicity, Religion and Belief* (the Ethnicity Anti-Discrimination Act); Sweden, *Discrimination Act* (2008:567).

¹⁴⁰⁹ CESCR, *General Comment Number 3* (The Nature of States Parties' Obligations, Art. 2, Para.1, of the Covenant); *General Comment Number 20* (Non-discrimination in Economic, Social and Cultural Rights, art. 2, para. 2, of the ICESCR).

¹⁴¹⁰ Principle 23, 24;

¹⁴¹¹ CERD, *General Comment Number 32* para 17. See also conclusion and recommendation by E Ott, PDES/2013/16 para 130.

persecution which most refugees go through can have an impact on their lives, at least in the short-term. In short, refugees have no appropriate comparator. Their case should be approached differently and on a contextual basis. This is because they are a very diverse group originating from far and wide. They differ, inter alia, in levels of education, culture and social mores.

6.6.4 Monitor government institutions

Governments should demand more from their employees whose work is to help refugees secure employment. Institutions can be restructured and their capacity reinforced. Staff can be trained in how to approach employers on the issue of refugee employment, rather than training only refugees. When most of the policies designed to make refugees become competent members of society do not achieve their initial or intended goals, and when no one is liable for such acts of omission or commission even in the face of the glaring magnitude of the issue, the vetting of government employees can be called for.

6.7 Conclusion

The Refugee Gap is a truly interesting but complex phenomenon. The long-term unemployment which results in unprecedented and persistent poverty baffles refugees, researchers, and the authorities. Most of the programmes designed to curb the Gap fail to achieve their intended objectives. This could suggest a problem within the programmes themselves because they permanently focus on refugees, even though it is employers and trade unions who wield enormous influence over who gets a job. In the long-term, the authorities should be able to ameliorate the Gap, say from 50 to 25 per cent. When the Gap becomes permanent, it qualifies as a human rights violation. Such violations are grounded in legal principles. Although there is no law that can force an employer to hire a refugee, there is still a legal basis for action under international human rights, regional as well as domestic laws.

The question of whose responsibility it is to protect refugees from the Gap is clearly set out by the Universal Declaration of Human Rights, the Refugee Convention, the International Covenant on Economic, Social and Cultural Rights, the European Social Charter, European Union directives and national constitutions. When countries fail to protect refugees from the Gap, remedies including compensation can be pursued. The greatest challenge has been the

anticipated negative reaction from the public. Literature has however shown that the much-anticipated fear may not always materialize or it may last only for a short period of time.

On the other hand, public opinion and the media may even be in favour of positive measures. Again, there are very few pertinent issues that do not divide public opinion in free and democratic societies. Authorities do influence the quota of refugees to be resettled. Resettlement is always resisted but evidence of a symbiotic relationship is clear. If refugees are admitted or rejected according to the established law, a similar process of rules and regulations (positive measures) should be adopted to provide a panacea to the Gap. Only when the Nordic States rediscover their responsibilities under international human rights law obligations and commit to the expected standards, will the Gap be diminished. In the context of this thesis, if long-term unemployment among refugees is brought down to near the overall unemployment rates among the rest of the population, the solution to the Gap will have been found. And international human rights will have made a difference.

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Supplementary material /Appendix

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